Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF
PETER P. NGHIEM,

Petitioner,

vs.

NEC ELECTRONICS, INC., A CALIFORNIA CORPORATION; NEC CORPORATION (TOKYO), JAPAN (NIPPON ELECTRIC COMPANY), A JAPANESE CORPORATION; HIRO HASHIMOTO; H. YOSHIZAWA, DR.; GRANT HULSE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this petition for writ of certiorari, several issues related to Petitioner's right to due process and the importance of the question in administration of antitrust laws are presented to the Supreme Court of the United States. The questions presented for review are:

1. Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution, precludes federal courts from dismissing Petitioner's causes of action without affording him an opportunity for a judicial hearing on the merits of his case, despite the procedural mistake made by his counsel in failing to file a motion to vacate the arbitrary and capricious award in the district court.

2. Whether the Court of Appeals' denial of Petitioner's petition for rehearing with suggestion for rehearing en banc, without providing any explanatory briefs and comments on the overlooked facts and arguments despite the presence of exceptional circumstances, violated his due process rights.

3. Whether the exclusion provision in 9 U.S.C. § 1 can render an arbitration award unenforceable where Petitioner was a worker engaged in both interstate and foreign commerce, and has an employment contract within the meaning of 9 U.S.C. § 1.

4. Whether an adverse arbitration award of antitrust claim is enforceable when Petitioner was fraudulently enticed to accept the binding arbitration clause in the company handbook by availing himself through arbitration, and the inducement in entering into such binding arbitration contract was itself a product of a conspiracy to defraud and disguise unlawful activities under Title VII and antitrust laws.

5. Should the instant case be reversed and remanded because the record discloses that the arbitration award was arbitrary and capricious, present a showing of exceptional circumstances, and there were important, material, and pertinent facts and available witnesses which should have been heard by a jury.

6. Should the important cause of action of unfair trade practice under antitrust laws which was not ruled by the arbitrator, survive dismissal by federal courts.

LIST OF ALL PARTIES TO THE PROCEEDING

The Petitioner, Plaintiff-Appellant below, is Peter P. Nghiem, at all times herein mentioned, a citizen of the United States and of the State of California, and a resident of the State of California. Petitioner was subject to the jurisdiction of the United States and of the State of California.

The Respondents, Defendants-Appellees below, are NEC Electronics, Inc., a California corporation, NEC Corporation (Tokyo) Japan (Nippon Electric Company), a Japanese corporation and co-employees, Hiro Hashimoto, Dr. H. Yoshizawa and Grant Hulse.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of all Parties to the Proceeding	iii
Table of Contents	iv
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	4
Reasons for Granting the Writ	10
I. Exceptional circumstances presented warrant the granting of a writ of certiorari where petition was timely filed pursuant to 28 U.S.C. § 2101(c).	11
II. Due process clause of Fourteenth Amendment entitles Petitioner to a full and fair hearing on the merits of the case.	12
III. The important meaning of the contracts of employment exception in 9 U.S.C. § 1 has not been, but should be, clearly explained and settled by the Supreme Court. The Court of Appeals' decision in applying Federal Arbitration Act to Petitioner's employment contract was in conflict with other Circuit Courts' holding.	15

Contents

Page

IV. Certiorari should be granted in private antitrust actions because of conflict between decisions of Courts of Appeals in different Circuits and importance of question in administration of Clayton Act; particularly when Petitioner's antitrust claim was not ruled by arbitrator or any court. 17

V. The Supreme Court has consistently granted certiorari in antitrust actions to consider question of whether a violation of the Sherman Act occurs; particularly where rulings by Court of Appeals seemed to threaten effectiveness of private antitrust action as vital means for enforcing antitrust policy of the United States. 19

Conclusion 23

TABLE OF CITATIONS

Cases Cited:

American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) 10, 17

Armco Steel Co., L.P. v. CSX Corp., 790 F. Supp. 311 (D.D.C. 1991) 14

Bacashihua v. U.S. Postal Serv., 859 F.2d 405 (6th Cir. 1988) 16

Bourque v. Dettone, 589 A.2d 815 (R.I. 1991) 12

Contents

	Page
Case-Swayne Company v. Sunkist Growers, Inc., 88 S. Ct. 528 (1967)	21
Church v. Gruntal & Co., 698 F. Supp. 465 (S.D.N.Y. 1988)	14
C.I.R. v. Duberstein, 80 S. Ct. 1190 (N.Y. 1960)	22
Continental Ore Co. v. Union Carbide & Carbon Corp., 82 S. Ct. 1404 (Cal. 1962)	21
Copley v. NCR Corporation, 394 S.E. 2d 751 (W. Va. 1990)	16
De Beers Mines v. United States, 325 U.S. 212 (1945)	21
Dennett v. Hogan, 9 S. Ct. 18 (Cal. 1973)	22
Estelle v. Gamble, 97 S. Ct. 285 (1976)	15
Federal Power Commission v. Tusearora Indian Nation, 80 S. Ct. 543 (App. D.C. 1960)	16
Federal Trade Commission v. Dean Foods Co., 384 U.S. 597 (1966)	22
Federal Trade Com'n v. National Lead Co., 77 S. Ct. 502 (1957)	21, 22
First Nat. Bank of Ariz. v. Cities Service Co., 88 S. Ct. 1575 (1968)	17

Contents

	Page
Fortenberry v. Fortenberry, 338 So. 2d 806 (Miss. 1976) .	13
Franklin v. Murphy, 745 F.2d 1221 (1984)	15
Franklin v. State of Oregon, State Welfare Division, et al., 662 F.2d 1337 (9th Cir. 1981)	15
F.T.C. v. Flotill Products, Inc., 88 S. Ct. 401 (Cal. 1967) ..	16
Grannis v. Orlean, 34 S. Ct. 79 (1914)	12
Haines v. Kerner, 92 S. Ct. 594 (1972)	15
Haleck v. Berliner, 427 F. Supp. 1225 (1977, D.C. Dist. Col.)	2
Herdman v. Pennsylvania R. Co., 77 S. Ct. 455 (Ohio 1957)	15
Herring v. Delta Airlines, Inc., 894 F.2d 1020 (9th Cir.), 110 S. Ct. 1319 (1990)	16
Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964)	17
In re Hops Antitrust Litigation, 655 F. Supp. 169 (E.D. Mo. 1987)	14
In Re Prine's Estate, 208 So. 2d 187 (Miss. 1968)	14
Jarecki v. G.D. Searle & Co., 81 S. Ct. 1579 (Ill. 1961) ...	16

Contents

Page

Kelly v. Kosuga, 79 S. Ct. 59 (1959) 20

Klor's, Inc. v. Broadway-Hale Stores, Inc., 79 S. Ct. 705 (1959) 19

Knetsch v. United States, 81 S. Ct. 132 (Cal. 1960) 16

Lake Communications, Inc v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984) 17

Litton Systems, Inc. v. American Tel. and Tel. Co., 568 F. Supp. 507 (1983) 12

Melrose Distillers, Inc. v. United States, 79 S. Ct. 763 (1959) 18

Minnesota M. & M. Co. v. New Jersey Wood Fin. Co., 85 S. Ct. 1473 (1965) 17

Mitchell v. Robert De Mario Jewelry, Inc., 80 S. Ct. 332 (Ga. 1960) 16

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S. Ct. 3346 (1985) 10, 17

Napue v. People of State of Ill., 79 S. Ct. 1173 (Ill. 1959) . 15

Nashville Milk Co. v. Carnation Co., 78 S. Ct. 352 (Ill. 1958) 18

Nghiem v. NEC Electronics, Inc., 25 F.3d 1437 (9th Cir. 1994) 1, 9

Contents

	Page
N.L.R.B. v. Metropolitan Life Ins. Co., 85 S. Ct. 1061 (R.I. 1965)	16
Perma Life Mufflers, Inc. v. Intern. Parts Corp., 88 S. Ct. 1981 (1968)	20
Poller v. Columbia Broadcasting System, 82 S. Ct. 486 (1962)	21
Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970)	14
Re 629 Church Street Bldg. Corp., 57 S. Ct. 88 (1936)	2
Ridenour v. Bay Co., 114 N.W. 2d 172 (1962)	12
Rosen v. Transx LTD., 816 F. Supp. 1364 (D. Minn. 1993)	16
Safeway Stores Inc. v. Vance, N.M., 78 S. Ct. 358 (1958)	18
Shook v. Gilmore & Tatge Mfg. Co., 851 S.W. 2d 887 (Tex. App.-Waco 1993)	13
Storer Communications v. Oldham County, Ky. App. 850 S.W. 2d 340 (1993)	14
Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835 (10th Cir. 1988)	14
Trans American National Gas Corp. v. Powell, 811 S.W. 2d 913 (Tex. 1991)	13

Contents

	Page
United States v. Price, 80 S. Ct. 326 (Ariz. 1960)	16
United States v. Shotwell Manufacturing Co., 77 S. Ct. 552 (1957)	22
U.S. Fidelity and Guar. Co. v. Rossa, 830 S.W. 2d 668 (Tex. App. - Waco 1992)	13
Weeks v. Weeks, 556 So. 2d 348 (Miss. 1990)	13

Statutes Cited:

9 U.S.C. § 1	i, 5, 10, 15, 16
15 U.S.C.A. § 1	20
15 U.S.C.A. § 13(a)	18, 20
15 U.S.C.A. § 15	18, 21
28 U.S.C. § 1254	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	9
28 U.S.C. § 1651	2
28 U.S.C. § 1651(a)	2, 3
28 U.S.C. § 2101(c)	3, 4, 11, 12

Contents

Page

United States Constitution Cited:

Fourteenth Amendment ..... i, 2, 3, 12, 15

Rules Cited:

Supreme Court Rule 20 2

Supreme Court Rule 20.1 4

Federal Rule of Appellate Procedure 4(a)(1) 9

APPENDIX

Appendix A — Decision of the United States Court of Appeals for the Ninth Circuit Decided June 3, 1994 .. 1a

Appendix B — Order of the United States Court of Appeals for the Ninth Circuit, Entered July 14, 1994, Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc 12a

Appendix C — Decision of the United States District Court for the Northern District of California, Entered June 9, 1992 ..... 14a

Appendix D — Petition for Rehearing of Plaintiff-Appellant with Suggestion for Rehearing En Banc Submitted on June 17, 1994 ..... 19a

Appendix E — Revised Reply Brief Submitted on December 28, 1992 ..... 37a

Contents

Page

Appendix F — Declaration of Peter Nghiem in Support of Appellant-Plaintiff's Brief Submitted on October 14, 1992 ..... 68a

Appendix G — Supplemental Declaration of Peter Nghiem in Support of Appellant-Plaintiff's Reply Brief Submitted on December 14, 1992 ..... 78a

Petitioner respectively requests the issuance of a writ of certiorari from the Supreme Court of the United States, directed to the Honorable Alex Kozinski and Diarmuid F. O'Scannlain, Judges of the United States Court of Appeals for the Ninth Circuit; Paul G. Hatfield, Chief Judge for the District of Montana, sitting by designation; and other Judges of the United States Court of Appeals for the Ninth Circuit; and to the Honorable Ronald M. Whyte, Judge of the United States District Court for the Northern District of California.

OPINIONS BELOW

1. The official reported decision of the United States Court of Appeals for the Ninth Circuit, was filed June 3, 1994, and is reproduced in full in Appendix A, *Nghiem v. NEC Electronics, Inc.*, 25 F.3d 1437 (9th Cir. 1994). This decision affirmed the ruling of the district court, __F.Supp.__.

2. The reported decision of the United States Court for the Northern District of California, filed June 9, 1992, granting NEC's motion for confirmation of arbitration award and dismissing Petitioner's suit in its entirety, is reproduced in full in Appendix C, __F. Supp. __.

3. The revised reply brief of Plaintiff-Appellant, filed December 28, 1992, and the petition for rehearing of Plaintiff-Appellant with suggestion for rehearing en banc, timely filed June 17, 1994, by Petitioner in the United States Court of Appeals for the Ninth Circuit, are reproduced in full in Appendix E and D, respectively. The Order of that court, denying petition for rehearing and rejecting suggestion for rehearing en banc, filed July 14, 1994, is reproduced in full in Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction to grant the writ of certiorari is conferred on this

Court by the provisions of 28 U.S.C. § 1254(1), 28 U.S.C. § 1651(a) and Rule 20 of the Rules of this Court.

28 U.S.C. § 1254(1) gives the Supreme Court the power to grant certiorari "before or after" the court of appeals renders judgment. 28 U.S.C. § 1651 authorizes Supreme Court to issue certiorari to give full force and effect to existing appellate authority and for furthering justice in other kindred ways. *See Re 629 Church Street Bldg. Corp.*, 57 S. Ct. 88 (1936). The extraordinary writ is in support of the Court's appellate jurisdiction.

Although the decision of the United States Court of Appeals for the Ninth Circuit is final, it is subject to review by the Supreme Court of writ of certiorari. In *Haleck v. Berliner,* 427 F. Supp. 1225 (1977, D.C. Dist. Col.), the Court held that the language of District of Columbia statute (DCCE 11-1529(f)) stating that decisions of special court are "final and conclusive" should not be construed as attempt to preclude Supreme Court review of decisions of special court with respect to constitutional questions, and All Writs Act (28 U.S.C. § 1651(a)) would be sufficient authorization for Supreme Court to entertain petition for appropriate writ if review of decision of special court were sought.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provision of the Constitution of the United States involved in this petition is:

> AMENDMENT XIV (Passed by Congress June 13, 1866. Ratified July 9, 1868).
>
> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

> States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

The statutes conferring jurisdiction on this Court to grant extraordinary writs in aid of its appellate jurisdiction and this Court's rule implementing that statutes, in pertinent part, are:

28 U.S.C.S. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree, . . .

28 U.S.C.S. § 1651(a):

> The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C.S. § 2101(c):

> Any other appeal on writ of certiorari intended

> to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. . . .

Rules of the Supreme Court of the United States, Rule 20.1:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

This is a case where Petitioner's right to due process is violated by several circumstantial procedural errors. The case was dismissed in its entirety without having an opportunity for a full and fair trial on the merits, particularly the causes of action under Title VII and antitrust laws.

Petitioner, Peter Nghiem, an American citizen of Vietnamese heritage, was employed by NEC Electronics, Inc. in California as a Senior Product Marketing Engineer operating in the capacity of a "COT/CAD Product Marketing Manager" of the ASIC Strategic Marketing department from August 31, 1989 until he was unjustly discharged on June 11, 1990. Based upon the representations, promises and assurances made by Respondents that Petitioner's

rational advice and effort for NEC would be respected and that Petitioner would be rewarded with a long term management position with NEC despite his Vietnamese heritage, Petitioner accepted NEC's employment offer. Petitioner was assigned to create the infrastructure to support and expand the COT (Customer Owned Tooling) (ASIC foundry) business in the United States, develop marketing strategies, establish joint marketing activities and business alliance with United States CAD vendors, and improve the company's image through trade shows, technical seminars, marketing literatures and advertising.

Petitioner was directly involved in managing CAD projects and sales of semiconductor products across state lines and inter-continents between Japan and the United States. Petitioner's employment contract of "workers engaged in foreign or interstate commerce" fell within the exclusion provision in 9 U.S.C § 1 of the Federal Arbitration Act.

Shortly after Petitioner joined NEC, Petitioner proposed the adoption and integration of third party United States CAD vendors' tools to the NEC CAD design system to solve a major problem in gate array and standard cell layout work caused by NEC's antiquated in-house "place and route" software. In the corporate ASIC Product Planning meeting in Tokyo on November 16 and 17, 1989 with NEC Tokyo and NEC Europe representatives, Petitioner presented his "COT Strategic Marketing Plan" which also included CAD marketing and CAD development strategies. Petitioner received a favorable response from the Corporate Product Planning and Business Development Committee. Following Petitioner's proposal and after several months of intensive evaluation, in the second quarter of 1990, NEC decided to acquire the necessary technology and CAD tools from Cadence for around $20M through a technology partnership which saved NEC in excess of $30M and two to three years of development time.

Petitioner successfully completed several other projects in the CAD strategic marketing area in addition to the Cadence contract development and negotiation. Ever since NEC corporate sanctioned the joint development and technology partnership with United States CAD vendors early in 1990, Respondents exercised different tactics to steal Petitioner's work and his credit, and take it as Respondents' own to improve their career and relationship with NEC Tokyo while hindering Petitioner's advancement. Respondents conspired to ignore Petitioner's work accomplishments, harass, humiliate and mistreat Petitioner both in public and private, and to create an unfair performance evaluation in April of 1990 with pretextual reasons and false accusations to drive Petitioner out of NEC.

While Petitioner's initiatives in the CAD area were overwhelmingly adopted by Respondents, his efforts in the COT (ASIC foundry) area were not supported by Respondents who, on the facade, continued to urge Petitioner to fulfill the COT assignments. Respondents conspired to secretly hamper the COT business development by using Petitioner as a "scapegoat" to cover up their unlawful and unfair trade practice. Respondents deliberately obstructed the technical information transfer from NEC Tokyo to NEC Electronics Inc.'s facilities in the United States and hampered the formation of the COT technical support group in the United States, particularly at the domestic manufacturing facility in Roseville, California, in order to restrict production, control and fix price, and manipulate the market to the detriment of United States customers. NEC purposely delayed the development projects of United States customers, particularly PC chipset vendors such as Chips & Technologies to give NEC's PC system group the advantage of getting its products to the market ahead of United States competitors. By not setting up the required basic infrastructure to support COT customers in the United States and creating artificial barriers in the exchange of technical information and engineering support necessary for the completion

of customers' projects, NEC wrongfully and illegally exacted an advantage over its competitors. Nghiem refused to participate in NEC's hidden agenda.

When Nghiem reported to Human Resource Department on May 9, 1990 the management problem and the secret attempt of NEC to hamper the COT business development in the United States , Respondents immediately retaliated against Petitioner by creating false incidents of dispute and utilizing these incidences as grounds for Petitioner's dismissal on June 11, 1990. As part of a conspiracy to damage Petitioner's credibility as a witness to Respondents' unlawful activities, NEC acted wilfully and maliciously in framing and slandering Petitioner. NEC wrongfully accused Petitioner of having communication problems, lack of organizational skill, insubordination and unprofessional conduct to deprive his unemployment insurance benefits and compensations, prevent him from obtaining subsequent employment and destroy his career and his personal welfare.

Throughout the period of employment at NEC, Petitioner was subject to several discrimination practices of Respondents who outrageously mistreated Petitioner. Because of Petitioner's race and national origin, he was continuously and intentionally harassed, humiliated, intimidated and treated unfairly. Although Petitioner was well-qualified for a management position in consideration of his work accomplishments, strong academic background and work experience in the semiconductor industry, particularly in ASIC, NEC refused to promote Petitioner as promised because of his national origin. Instead of rewarding Petitioner for completing his work assignments and performing his job function exceptionally well, Respondents blacklisted, slandered and dismissed Petitioner, and deliberately violated his civil rights to subject Petitioner to mental anguish and severe emotional distress. None of these merits of the case, particularly the cause of action under antitrust laws, have been fully and fairly considered by the courts.

In good faith of resolving the problem internally with NEC, Petitioner exhausted all administrative procedures including arbitration as step four of the company's "Problem Resolution Process". Petitioner's employment contract with NEC did not contain a binding arbitration clause. However, Petitioner felt compelled to use the arbitration process because of the language of the handbook that said "[Step Four] is the only process by which an employee or terminated employee may pursue a complaint and "If you desire to pursue the complaint further, the complaint must be submitted to an impartial arbitrator or it is waived." Because of NEC's demands and representations, Petitioner followed the Step Four with the understanding that the arbitration would not be binding against him, but only against NEC.

On June 10, 1991, while going through arbitration process, Petitioner filed suit in state court, alleging eleven causes of action. On February 5, 1992, Petitioner filed the first amended complaint in state court with the same causes of action, wrongful termination, breach of implied-in-fact contract, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent representation, libel and slander, race discrimination, unjust enrichment, unfair trade practice and conspiracy. On November 18, 1991, the arbitrator rendered a decision in favor of NEC which was arbitrary and capricious. The arbitrator did not make any ruling on the statutory claim of antitrust violation because he assumed that Petitioner had dropped this claim.

On March 6, 1992, NEC removed the case to the federal district court. Petitioner's counsel did not file a motion to vacate the arbitrary and capricious arbitration award although Petitioner was entitled to vacation of such irrational award on the basis of fraud, undue means, manifest disregard of the law, and evident partiality and misconduct of the arbitrator. Moreover, Petitioner's counsel deliberately failed to include arguments supporting

Petitioner's causes of action under Title VII and antitrust laws in his "Memorandum Of Points And Authorities In Opposition To Defendant NEC Electronics, Inc.'s Motion For Confirmation Of Arbitration Award And Dismissal, . . ." On June 9, 1992, *Nghiem v. NEC Electronics, Inc.*, __ F. Supp.__, the district court granted NEC's motion for confirmation of the arbitration award and dismissed Petitioner's suit in its entirety.

Petitioner timely filed his Notice of Appeal on June 16, 1992, pursuant to Federal Rule of Appellate Procedure § 4(a)(1). 28 U.S.C.A. § 1291 grants federal court jurisdiction to appeals "from all final decisions of the district courts."

On October 14, 1992, Petitioner timely appealed the case to the United States Court of Appeals for the Ninth Circuit. On June 3, 1994, the Circuit Court ruled in favor of NEC, *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437 (9th Cir. 1994), affirming the district court's judgment while overlooking several critical arguments and material facts.

On June 17, 1994, Petitioner timely submitted a petition for rehearing with suggestion for rehearing en banc to the Ninth Circuit Court directing the Court's attention to the material points of fact and law overlooked in the Court's decision and the exceptional circumstances. The Circuit Court denied the petition for rehearing and rejected the suggestion for rehearing en banc, without giving any explanatory brief or argument.

The District Court and Circuit Court refused to grant Petitioner evidentiary hearings and each of them ignored the evidence submitted by Petitioner demonstrating the merits of his claim. The courts enforced the arbitrary and capricious arbitration award as if it were a final judgment on all the merits of Petitioner's eleven causes of action.

REASONS FOR GRANTING THE WRIT

1. Failure to grant the writ of certiorari will cause irreparable injury to Petitioner since his due process right to full and fair judicial hearing on the merits of his claims, particularly his causes of action under Title VII and antitrust laws, will be deprived forever.

2. Both the District Court and the Circuit Court have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. The Ninth Circuit Court's decision to affirm the district court's ruling which confirmed the arbitrary and capricious arbitration award and dismissed Petitioner's suit in its entirety without considering his constitutional right to due process; and deny Petitioner's petition for rehearing without considering the exceptional circumstances and giving any reasons, clearly manifests injustice and abuse of discretion.

3. The United States Court of Appeals for the Ninth Circuit overlooked the important question of the inapplicability of Federal Arbitration Act to "employment contract[s]" of Petitioner who was a "worker[s] engaged in foreign or interstate commerce" in light of the exclusion provision in 9 U.S.C. § 1, which has not been, but should be, settled by the Supreme Court (*see* Appendix D, 27a-31a).

4. The United States Court of Appeals for the Ninth Circuit has rendered a decision against Petitioner following the holding of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 105 S. Ct. 3346 (1985), rather than the established doctrine of *American Safety Equipment Corp. v. J.P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968) and its line of cases, while overlooking the very important fact that Petitioner's causes of action under antitrust laws were not ruled by the arbitrator, which is in conflict with the

decision of other United States Court of Appeals. Moreover, the Ninth Circuit failed to consider Petitioner's supplemental argument in the petition for rehearing

5. The confirmation of the arbitrary and capricious arbitration award, and dismissal of Petitioner's entire suit was not in order since the importance question in administration of the Sherman Act and Clayton Act was not fully examined by the courts. Particularly when pleadings, depositions, affidavits and admissions filed in the instant case show genuine issue as to material facts.

I.

EXCEPTIONAL CIRCUMSTANCES PRESENTED WARRANT THE GRANTING OF A WRIT OF CERTIORARI WHERE PETITION WAS TIMELY FILED PURSUANT TO 28 U.S.C. § 2101(c).

The exceptional circumstances presented warrant the exercise of the Court's power to issue a writ of certiorari since all other possible avenues of potential relief in federal courts have been exhausted but Petitioner's constitutional right to due process and his causes of action under Title VII and antitrust laws were still not considered. Adequate relief cannot be obtained in any other form or from any other court. Petitioner has exhausted all possible remedies. Error has been compounded on top of lower court error in confirming the arbitrary and capricious arbitration award, and dismissing the case in its entirety due to the district court's misinterpretation of Petitioner's intent in availing himself through arbitration and a serious procedural mistake made by his counsel in failing to file a motion to vacate the arbitration award in the district court.

Petitioner timely filed a petition for rehearing in the United

States Court of Appeals for the Ninth Circuit which extended the 90-day period provided in 28 U.S.C. § 2101(c) for filing a petition for a writ of certiorari in the Supreme Court. The 90-day period started from July 14, 1994, the date on which the Court of Appeals denied Petitioner's motion for rehearing. *See Litton Systems, Inc. v. American Tel. and Tel. Co.*, 568 F. Supp. 507 (1983).

II.

DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT ENTITLES PETITIONER TO A FULL AND FAIR HEARING ON THE MERITS OF THE CASE.

A petition for writ of certiorari to the Supreme Court of the United States is the only method by which review of violation, in course of due process or equal protection clauses of the Fourteenth Amendment of the United States Constitution can be made pursuant to U.S.C.A. Const. Amend. 14. This Due Process Clause is the guidepost for every trial court procedure. It is well settled that due process is primarily concerned with providing a full and fair trial on the merits. *See Ridenour v. Bay Co.*, 114 N.W. 2d 172 (1962), citing *Grannis v. Orlean*, 34 S. Ct. 79, 783 (1914). Encompassed within this mandate of fairness and due process is the right of a civil litigant to request, in certain cases, that legal matters be heard by a panel of impartial jurors.

Petitioner has not had a full and fair hearing on the merits of his causes of action. Although due process requirements of fair trial also apply to procedures of administrative agencies, *See Bourque v. Dettone*, 589 A.2d 815 (R.I. 1991), Petitioner received an arbitrary and capricious arbitration award in favor of NEC. Such award was procured by undue means, witness perjury and, as being in manifest disregard of the law, abuse of discretion and evident partiality of the arbitrator.

Subsequently, Petitioner's request for a trial de novo at arbitration was rejected. The parties should be afforded a full and complete hearing at which the parties have an opportunity to call witnesses in their behalf and be heard by themselves or counsel. *See Fortenberry v. Fortenberry,* 338 So. 2d 806 (Miss.1976). If a full and complete hearing is not allowed by refusing a party his opportunity to present evidence, then he is thereby deprived of due process. In *Weeks v. Weeks,* 556 So. 2d 348 (Miss. 1990), the Supreme Court of Mississippi held that ex-husband was deprived of due process when chancellor prevented him from presenting his witnesses' testimony in support of his motion for new trial.

The Ninth Circuit's affirmation of the District Court's decision confirming the arbitrary and capricious arbitration award and dismissing Petitioner's suit in its entirety manifests injustice and deprived Petitioner of his right to due process. According to the Supreme Court in *TransAmerican National Gas Corp. v. Powell,* 811 S.W. 2d 913, 918 (Tex. 1991), "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of the case." Concurrently, the Court in *Shook v. Gilmore & Tatge Mfg. Co.,* 851 S.W.2d 887 (Tex.App.-Waco 1993), in a wrongful death action, reversed and remanded the cause for further proceedings and held that court abused its discretion in dismissing causes of action with prejudice as without considering availability of lesser sanctions before dismissal or affording plaintiff an opportunity for hearing on the merits of his case.

The record does not support a presumption that Petitioner's claims lack merit. The courts made no analysis that would support the conclusion that Petitioner's claims were meritless in any of their opinions. *See U.S. Fidelity and Guar. Co. v. Rossa,* 830 S.W.2d 668, 673 (Tex.App.-Waco 1992). Therefore, remand is necessary for development of material facts because the record

shows that there were important and pertinent facts and available witnesses which should have been heard. *See In Re Prine's Estate,* 208 So. 2d 187, 192 (Miss.1968)

The Ninth's Circuit refused to consider the overlooked arguments and material facts presented in the petition for rehearing. Petitioner's arguments, relying on *Telum, Inc. v. E.F. Hutton Credit Corp.,* 859 F.2d 835, 837 (10th Cir. 1988), that allegations of fraud in the inducement relating specifically to an arbitration provision may suspend application of such provision; and *Armco Steel Co., L.P. v. CSX Corp.,* 790 F. Supp. 311 (D.D.C. 1991), that arbitration of antitrust claim is not enforceable when there was allegation that contract itself was product of violation of antitrust laws; were not considered by the Court of Appeals (*see* Appendix D, 32a-35a). Moreover, the Court of Appeals' decision in confirming the arbitration award and dismissing the entire suit is in conflict with *Armco, In re Hops Antitrust Litigation,* 655 F. Supp. 169, 171-172 (E.D. Mo.1987) and *Church v. Gruntal & Co.,* 698 F. Supp. 465, 469 (S.D.N.Y.1988), where Petitioner's causes of action under antitrust laws should have survived dismissal because his antitrust claim was not submitted to the arbitrator for decision in the closing brief and the arbitrator did not rule on this issue. Besides, the Court of Appeals did not issue any explanatory briefs or arguments to support its denial of the petition.

The court in *Storer Communications v. Oldham County, Ky.App.,* 850 S.W. 2d 340 (1993), held that trial court's dismissal of taxpayer's suit, without motion, proper notice or briefs or arguments, violated taxpayer's due process rights. In *Potter v. McCall,* 433 F.2d 1087, 1088 (9th Cir.1970), where the plaintiff has paid the filing fees, the court may not dismiss an action before process is issued and served, and without giving plaintiff notice that the court intends to dismiss, an opportunity to oppose it, a statement of the grounds for dismissal, and an opportunity to amend.

The court in *Franklin v. Murphy,* 745 F.2d 1221 (1984), held that a district court can only dismiss an action *sua sponte* before service of process when it clearly lacks jurisdiction or the *in forma pauperis* (IFP) action is frivolous. *See Franklin v. State of Oregon, State Welfare Division, et al.,* 662 F.2d 1337 (9th Cir. 1981) (*Franklin I*). The legal component of the frivolity standard is similar to the test for dismissal of *pro se* complaints for failure to state a claim. *See Estelle v. Gamble,* 97 S. Ct. 285, 292 (1976); *Haines v. Kerner,* 92 S. Ct. 594 (1972). However, pro se complaint may be dismissed for failure to state a claim only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". In the instant case, Petitioner has come forward with ample evidence to substantiate his claims which have solid factual and legal basis for his causes of action. Therefore, the Court should grant certiorari to determine whether Petitioner has been erroneously deprived of jury trial of his case, *See Herdman v. Pennsylvania R. Co.,* 77 S. Ct. 455 (Ohio 1957), and consider question whether Petitioner was denied due process of law in violation of U.S.C.A. Const. Amend. 14. *See Napue v. People of State of Ill.,* 79 S. Ct. 1173 (Ill.1959).

III.

THE IMPORTANT MEANING OF THE CONTRACTS OF EMPLOYMENT EXCEPTION IN 9 U.S.C. § 1 HAS NOT BEEN, BUT SHOULD BE, CLEARLY EXPLAINED AND SETTLED BY THE SUPREME COURT. THE COURT OF APPEALS' DECISION IN APPLYING FEDERAL ARBITRATION ACT TO PETITIONER'S EMPLOYMENT CONTRACT WAS IN CONFLICT WITH OTHER CIRCUIT COURTS' HOLDING.

Although several circuit courts and the Supreme Court of West Virginia have ruled that Federal Arbitration Act (FAA) does not apply to "class of workers engaged in foreign or interstate

commerce" with "employment contracts" within the meaning of the exclusion provision in 9 U.S.C. § 1, the Supreme Court of the United States has not yet clearly explained the meaning of these contracts of employment exception in any of the Court's decisions. *See Copley v. NCR Corporation,* 394 S.E. 2d 751 (W. Va. 1990); *Rosen v. Transx LTD.,* 816 F. Supp. 1364 (D. Minn. 1993); *Herring v. Delta Airlines, Inc.,* 894 F.2d. 1020 (9th Cir.), 110 S. Ct. 1319 (1990); *Bacashihua v. U.S. Postal Serv.,* 859 F.2d 405 (6th Cir. 1988). The Court should settle this important question of federal law and determine in the instant case whether Petitioner's claims should have been excluded from FAA because Petitioner was an individual worker personally engaged in both foreign and interstate commerce. (*See* Appendix D, 27a-31a).

In ruling that the Federal Arbitration Act governs the instant case despite the applicability of the exclusion provision in 9 U.S.C. § 1 to Petitioner's employment contract with NEC, the Ninth Circuit's decision was in conflict with other Court of Appeals in different circuits. Therefore, the Supreme Court should grant certiorari as it has consistently done so to resolve conflict between decisions of Courts of Appeals for two or more circuits. *See F.T.C. v. Flotill Products, Inc.,* 88 S. Ct. 401 (Cal.1967); *N.L.R.B. v. Metropolitan Life Ins. Co.,* 85 S. Ct. 1061 (R.I.1965); *Jarecki v. G.D. Searle & Co.,* 81 S. Ct. 1579 (Ill. 1961); *Knetsch v. United States,* 81 S. Ct. 132 (Cal. 1960); *Federal Power Commission v. Tusearora Indian Nation,* 80 S. Ct. 543 (App. D.C. 1960); *Mitchell v. Robert De Mario Jewelry, Inc.,* 80 S. Ct. 332 (Ga. 1960); *United States v. Price,* 80 S. Ct. 326 (Ariz. 1960).

IV.

CERTIORARI SHOULD BE GRANTED IN PRIVATE ANTITRUST ACTIONS BECAUSE OF CONFLICT BETWEEN DECISIONS OF COURTS OF APPEALS IN DIFFERENT CIRCUITS AND IMPORTANCE OF QUESTION IN ADMINISTRATION OF CLAYTON ACT; PARTICULARLY WHEN PETITIONER'S ANTITRUST CLAIM WAS NOT RULED BY ARBITRATOR OR ANY COURT.

The Ninth Circuit in the instant case overruled its own precedent decision in *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir.1984) following the holding of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 105 S. Ct. 3346 (1985), rather than the established doctrine of *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968), and its line of cases to prevent submission of antitrust claims to arbitration. There was conflict between decisions of Courts of Appeals in different circuits on this issue. Nevertheless, both the District Court and the Ninth Circuit overlooked the very important fact that Petitioner's causes of action under antitrust laws was not ruled by the arbitrator. When there was a genuine issue as to material facts remaining for trial, particularly in antitrust action, the courts erred in dismissing the entire suit. Therefore, certiorari should be granted.

In *Minnesota M.& M. Co. v. New Jersey Wood Fin. Co.*, 85 S. Ct. 1473 (1965), the Court granted certiorari in private treble damages antitrust action because of conflicts between circuits, *also see Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964), and the importance of the question in the administration of the Clayton Act. Similarly, in *First Nat. Bank of Ariz. v. Cities Service Co.*, 88 S. Ct. 1575 (1968), certiorari was granted to determine whether decisions of federal courts were in

conformity with prior Supreme Court decision relating to availability of summary judgment in antitrust litigation.

Granting certiorari to resolve conflict between decisions of Courts of Appeals in different circuits in antitrust action was often performed by the Supreme Court. As in *Safeway Stores Inc. v. Vance, N.M.*, 78 S. Ct. 358 (1958), where the issue is whether private remedies afforded by Clayton Act, §§ 15 and 26 of Title 15, could be availed of for injuries allegedly caused by violations of Robinson-Patman Price Discrimination Act, § 13a of Title 15. *See* companion case *Nashville Milk Co. v. Carnation Co.*, 78 S. Ct. 352 (Ill. 1958). Similarly, the Court in *Melrose Distillers, Inc. v. United States*, 79 S. Ct. 763 (1959), granted certiorari to review case presenting question on which there was a conflict among the circuits as to whether antitrust proceedings against corporations would abate when those corporations were dissolved.

Therefore, taking into account the fact that Petitioner's causes of action under antitrust laws have neither been fully heard nor ruled by the arbitrator or any court, the Supreme Court should grant certiorari to consider the important question in administration of antitrust laws where conflict of decisions between Court of Appeals of different circuits exists.

V.

THE SUPREME COURT HAS CONSISTENTLY GRANTED CERTIORARI IN ANTITRUST ACTIONS TO CONSIDER QUESTION OF WHETHER A VIOLATION OF THE SHERMAN ACT OCCURS; PARTICULARLY WHERE RULINGS BY COURT OF APPEALS SEEMED TO THREATEN EFFECTIVENESS OF PRIVATE ANTITRUST ACTION AS VITAL MEANS FOR ENFORCING ANTITRUST POLICY OF THE UNITED STATES.

Petitioner's claim under the antitrust laws is not only a private matter but also a public interest issue. Since antitrust violation can affect millions of people and inflict staggering economic damage to the whole nation, The Court should grant certiorari to consider whether a violation of the Sherman Act occurs where NEC Electronics Inc., a Japanese electronics company's wholly owned subsidiary in the United States, and NEC Corporation in Japan, through its managerial employees, acted in concert to illegally restrain trade and fix price to detriment of United States customers in 1989 and 1990.

The Supreme Court has consistently granted certiorari to review antitrust action presenting question of administration and application of the Sherman Act. The Court in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 79 S. Ct. 705 (1959), granted certiorari to consider question of whether a violation of the Sherman Act occurs where a group of business men act in concert to deprive a single merchant of the goods he needs to compete effectively, even though such action by the business men does not result in a reduction of opportunities for customers to buy in a competitive market. The Court in *Klor's* reversed judgment of the Court of Appeals for the Ninth Circuit affirming summary judgment and dismissing Klor's complaint, and remanded cause to district court for trial.

In *Kelly v. Kosuga,* 79 S. Ct. 59 (1959), the Court granted certiorari to consider availability of buyer's pleaded defense of illegality under the Sherman Act in an action to enforce the terms of a sale made under state law. Along the same line, the Court in *Perma Life Mufflers, Inc. v. Intern. Parts Corp.,* 88 S. Ct. 1981 (1968), granted certiorari because it is inappropriate for the Court of Appeals to invoke broad common-law barriers to relief such as *in pari delicto,* where a private suit serves important public purposes to enforce the antitrust policy of the United States. Summary judgment for *Intern. Parts* affirmed by Court of Appeals was reversed and remanded with direction.

NEC's illegal restraint of trade by deliberately hampering the formation of the infrastructure to support and expand ASIC foundry business in the United States was verified by Defendant, Dr. Hitoshi Yoshizawa, an adversary witness, in his testimonies at arbitration (*see* Appendix G, 86a-87a). Moreover, Petitioner's pleadings and declaration affidavits show allegation of violations of the restraint of trade and price fixing §s of the Sherman Act and Clayton Act[1]. The importance of the question in administration of

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1. *Section 1 of the Sherman Act,* 15 U.S.C.A. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Clayton Act, 15 U.S.C.A. § 13(a), as amended, provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

(Cont'd)

antitrust laws in the instant case warrants the issuance of writ of certiorari. As in *Poller v. Columbia Broadcasting System,* 82 S. Ct. 486 (1962), the Court granted certiorari in action to recover treble damages based on alleged violations of the restraint of trade and monopoly section of the Sherman Law. The Court in *Poller* held that pleadings and affidavits presented issues of facts as to participation of a nationwide broadcasting company and others in a conspiracy to restrain trade or eliminate competition by cancelling an affiliation contract and eliminating a certain local broadcasting station from the broadcast field in a certain city, precluding summary judgment. Therefore, the Court of Appeals' judgment in *Poller* was reversed and remanded.

Certiorari was granted as to issues requiring examination in light of previous decisions of Supreme Court and presenting important questions under antitrust laws. *See Continental Ore Co. v. Union Carbide & Carbon Corp.,* 82 S. Ct. 1404 (Cal. 1962). In order to determine scope of association's exemption from antitrust laws, the Court in *Case-Swayne Company v. Sunkist Growers, Inc.,* 88 S. Ct. 528 (1967), granted certiorari in treble damages antitrust action against orange growers association. *Also see De Beers Mines v. United States,* 325 U.S. 212 (1945).

The Supreme Court has also granted certiorari because of importance of the question in administration of Federal Trade Commission Act in *Federal Trade Com'n v. National Lead Co.,* 77

(Cont'd)

Section 4 of the Clayton Act, 15 U.S.C.A. § 15, states: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act grants a private cause of action for injunctive relief against "threatened loss or damage by a violation of the antitrust laws."

S. Ct. 502 (1957), to review case presenting question of power of Federal Trade Commission to frame order entered upon finding that sellers had adopted and used zone pricing system in sale of lead pigments, to foster monopoly and stifle competition, prohibiting not only concert of action in further use of system but directing each individuality to cease and desist from a adopting such a system to match prices of competitors. *Also see Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966).

To consider question whether a violation of Sherman Act occurs where there is allegation of price fixing as part of NEC's conspiracy to illegally control production and restrain trade to manipulate market to detriment of United States customers (*see* Appendix G, paragraphs 16-18, pages 85a-87a), the Supreme Court should grant certiorari, reverse the judgment of Court of Appeals and remand the cause of action to District Court for trial. In *United States v. Shotwell Manufacturing Co.*, 77 S. Ct. 552 (1957), where defendants were convicted of income tax evasion, the government's petition for certiorari was granted by the Supreme Court with limitations. The Court later in the same case, 78 S. Ct. 245 (1957) vacated such limited writ and granted nunc pro tunc the petition for certiorari without restriction, vacated judgment of Court of Appeals and remanded case to District Court for further proceedings.

It is not unusual that the Supreme Court, on certiorari, would vacate judgment of Court of Appeals and would remand case to District Court to make new and adequate findings of fact. *See C.I.R. v. Duberstein*, 80 S. Ct. 1190 (N.Y.1960). In *Dennett v. Hogan*, 9 S. Ct. 18 (Cal. 1973), the Court held that where it appeared that judge was unaware of petitioner's initial request for counsel and mistakenly believed that indigent petitioner had never filed financial affidavit with trial court, petition would be treated as one for certiorari which would be granted and case remanded to Court of Appeals for determination of whether appeal had been improvidently dismissed.

For good causes shown and the precedent favorable holdings of the Supreme Court in antitrust actions, Petitioner's request for granting of writ of certiorari, reversal of Ninth Circuit's decision and remand of cause to District Court for trial is warranted.

CONCLUSION

Unless relief is forthcoming from this Court, in the exercise of its writ of certiorari or extraordinary writ jurisdiction, the drastic harm caused to Petitioner by the judgments of the District Court and the Circuit Court, which is void because the merits and due process right were never considered, will become permanent and irreparable. There is no other remedy at law in any other forum for Petitioner to pursue further with his causes of action, particularly his claim under Title VII and antitrust laws.

With all the special and important reasons stated herein, Petitioner respectfully requests the Supreme Court to grant writ of certiorari, reverse the judgment of the Court of Appeals and remand the case back to the District Court for further proceedings including a trial by jury.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED JUNE 3, 1994

PETER P. NGHIEM, Plaintiff-Appellant,

v.

NEC ELECTRONIC, INC., a California corporation; NEC Corporation; Japan (Nippon Electric Company), a Japanese corporation; Hiro Hashimoto; H. Yoshizawa, Dr.; Grant Hulse, Defendants-Appellees.

No. 92-16155

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted as to Defendants-Appellees
Nov. 4, 1993.

Submitted as to Plaintiff-Appellant
Nov. 4, 1993.

Decided June 3, 1994.

David H. Tollner, San Jose, CA, for plaintiff-appellant.

David J. Murphy and Keith R. Black, Littler, Mendelson, Fastiff & Tichy, San Jose, CA, for defendants-appellees.

Before KOZINSKI and O'SCANNLAIN, Circuit Judges; HATFIELD,* District Judge.

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* The Honorable Paul G. Hatfield, Chief Judge for the district of Montana, sitting by designation.

Appendix A

Opinion by Judge O'SCANNLAIN.

O'SCANNLAIN, Circuit Judge:

In this challenge to an arbitrator's award, we are asked to decide, among other issues, whether the so-called "*American Safety* doctrine" continues to prevent submission of antitrust claims to arbitration.

I

Peter Nghiem, an American citizen of Vietnamese heritage, was employed by NEC Electronics, Inc. in California from August 31, 1989 until he was fired in June 1990. Nghiem brought suit against NEC Electronics, Inc., NEC Corporation (Tokyo) Japan, and co-employees (collectively "NEC") alleging, inter alia, wrongful termination, race discrimination, and an antitrust violation. Nghiem claims that NEC had represented that it would provide a long-term management position to Nghiem if he accepted its employment offer.

On August 31, 1989, Nghiem signed an employment contract which did not contain an arbitration clause. Paragraph 11 of the contract states, in part: "No terms or provisions of this Agreement shall be varied or modified by any prior or subsequent act of either me or the Company except that the Company and I may subsequently amend this agreement by written instruments that specifically refer to this agreement and that are executed in the same manner as this agreement." Nghiem claims that he did not sign a modified version of NEC's employment contract because it contained a clause for binding arbitration.

On September 5, 1989 and May 7, 1990, Nghiem signed

acknowledgments for receipt of NEC's company handbook. The handbook explained that NEC had a four-step "Problem Resolution Process" for employee complaints. Nghiem claims that he felt compelled to use this process because the language of the handbook said that this was the only process for resolving employee complaints. Step Four of the process is "final and binding arbitration." Nghiem followed the four-step process, including initiating arbitration pursuant to Step Four.

Through the spring of 1991, Nghiem presented evidence and argument in the arbitration hearings, including a fifty-page closing brief. On November 18, 1991, the arbitrator rendered a decision in favor of NEC. On November 27, 1991, Nghiem wrote the American Arbitration Association ("AAA") to request a trial de novo and to confirm that the arbitration was not binding on him.

Meanwhile, on June 10, 1991, Nghiem had filed suit in state court on substantially the same issues. NEC removed to federal district court on March 6, 1992. On June 9, 1992, — F.Supp. — the district court granted NEC's motion for confirmation of the arbitration award and dismissed Nghiem's suit in its entirety, including the statutory claims of employment discrimination and an antitrust violation.

II

Nghiem contends that he is not bound by the arbitrator's decision because the Federal Arbitration Act ("FAA" or "the Act"), 9 U.S.C. §§ 1-14, requires that an agreement to arbitrate be in writing. 9 U.S.C. § 2. Nghiem points out that the contract he signed does not have an arbitration clause and that he did not sign a proposed subsequent contract which did. Although Nghiem claims that NEC told him he had to pursue arbitration, that is inconsistent with his claim that he consciously avoided signing any agreement

which would require him to pursue arbitration. The district court found that Nghiem voluntarily initiated binding arbitration and this finding is not clearly erroneous.

Nghiem further claims that he intended the arbitration to be nonbinding against him, but binding against NEC; his position is not persuasive. While the FAA "requires a writing, it does not require that the writing be signed by the parties." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.1987). In addition to the employee handbook, which provides for binding arbitration and which Nghiem acknowledges receiving, on September 21, 1990, Nghiem wrote a letter to NEC's Human Resource Director, Denny Mitchell, requesting to proceed with Step Four of NEC's problem resolution process — final and binding arbitration. This constitutes a writing memorializing an agreement to arbitrate.

Furthermore, even if these writings are insufficient, "[a]n agreement to arbitrate an issue need not be express; . . . it may be implied from the conduct of the parties." *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1356 (9th Cir.1983); *see also Teamsters Local Union No. 764 v. J.H. Merritt and Co.*, 770 F.2d 40, 42 (3d Cir.1985) (citing *Daniel*). In *Daniel*, this court reasoned that Daniel's conduct manifested an intent to arbitrate his dispute with his union because he sent a representative to the arbitration who listened to the union's evidence, presented limited evidence himself, and requested a second continuance. Two weeks later, Daniel's representative sent a letter to the arbitration board, claiming Daniel had no obligation to arbitrate and refusing to attend future hearings. The arbitrator issued a decision adverse to Daniel who appealed, arguing that the arbitrator had no such authority.

This court confirmed the arbitration award, holding that "[w]e have long recognized a rule that a party may not submit a claim to

arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result." *Daniel,* 724 F.2d at 1357. The court held that even though Daniel attempted to deny the arbitrator's authority before a decision was issued, "[i]t would be unreasonable and unjust to allow Daniel to challenge the legitimacy of the arbitration process, in which he had voluntarily participated over a period of several months, shortly before the arbitrator announced her decision." *Id.*

Similarly in this case, Nghiem initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief of fifty pages. Although he filed suit in state court before the arbitrator announced his final decision, that decision is still binding on Nghiem under *Daniel.* Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority. Nghiem is bound by the arbitrator's decision.

Furthermore, Nghiem's voluntary initiation of arbitration can be interpreted as waiver of any objection he may have had over the authority of the arbitrator. The Fifth Circuit has reasoned that "[o]n whatever basis it rests, waiver, estoppel or new contract, the result is that the grievance submitted to the arbiter defines his authority without regard to whether the parties had a prior legal obligation to submit the dispute." *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1,* 611 F.2d 580, 584 (5th Cir. 1980). This court in *Daniel* concluded that the appellant's "conduct demonstrated he agreed to submit this conflict to arbitration and waived any right to object." *Daniel,* 724 F.2d at 1357.

Finally, the Supreme Court has held that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be

resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of *waiver,* delay, or a like defense to arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353-54, 87 L.Ed.2d 444 (1985) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)) (emphasis added). Therefore, we hold that Nghiem has waived any objection to the arbitrator's authority to decide his claims.

NEC argues, as it did before the district court, that if the federal courts do not confirm the arbitration award pursuant to the FAA, the courts should, in the alternative, dismiss Nghiem' action or grant summary judgment based on res judicata or collateral estoppel, or both. Like the district court, we do not reach these arguments because we conclude that Nghiem clearly submitted his claim to binding arbitration.

III

Even if the arbitration is valid, Nghiem nevertheless claims that his employment discrimination complaint cannot be settled through such process and must be adjudicated in federal court. Although the earlier Supreme Court cases precluded Title VII cases from being subjected to compulsory arbitration, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Court has recently opened the door to arbitration of these claims. *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Before *Gilmer,* this court read *Alexander* as holding "that an employee's statutory right to trial de novo under Title VII is not foreclosed by prior submission of her claim to final arbitration under a collective-bargaining agreement." *Perugini v. Safeway Stores, Inc.*, 935 F.2d

1083, 1086 (9th Cir.1991). Although "the Supreme Court [did] not overrule *Alexander* in *Gilmer,* it [did] reject a reading of *Alexander* as prohibiting the arbitration of employment discrimination claims." *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305, 308 (6th Cir.1991).

The test of whether a statutory claim may be subject to arbitration is congressional intent. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 227, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987). Nghiem does not argue that Congress intended to exclude Title VII claims from arbitration. In any event, subsequent to *Gilmer,* this court has specifically upheld an employer's ability to arbitrate a Title VII claim. *Mago v. Shearson Lehman Hutton, Inc.,* 956 F.2d 932, 935 (9th Cir.1992) (plaintiff did not meet "her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act").

Nghiem rather argues that *Gilmer* does not apply because the 1991 amendments to Title VII provide for jury trial. We conclude, however, that establishing a right to jury trial for Title VII clams does not evince a congressional intent to preclude arbitration; it merely defines those procedures which are available to plaintiffs who pursue the federal option, as opposed to arbitration.

Title VII claims are clearly subject to arbitration and Nghiem's argument, therefore, fails.

IV

Nghiem further contends that his antitrust claims should be heard in federal court because antitrust claims are not subject to arbitration. Nghiem relies on *American Safety Equipment Corp. v.*

J.P. Maguire & Co., 391 F.2d 821 (2d Cir.1968). In *American Safety*, the Second Circuit held that antitrust claims cannot be arbitrated because of the public interest in enforcing antitrust laws, the potential bias and limited expertise of arbitrators, the complexity of antitrust law, and the procedural differences between trials and arbitrations. *Id.* 826-27. Until now, this circuit has followed the holding and reasoning of *American Safety*. *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1479 (9th Cir.1984).

In light of more recent Supreme Court decisions, however, we must review whether it is appropriate to continue to follow *American Safety*. "We are bound by decisions of prior panels' unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions." *United States v. Washington*, 872 F.2d 874, 880 (9th Cir.1989) (quoting *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir.1984)). In *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 632-35, 105 S.Ct. 3346, 3356-58, 87 L.Ed.2d 444 (1985), however, the Supreme Court has indeed undermined the reasoning behind *American Safety*. In *Mitsubishi*, the Court held that an antitrust claim could be submitted to an international arbitral tribunal.

Although *Mitsubishi* found "it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions," *Mitsubishi*, 473 U.S. at 629, 105 S.Ct. at 3355, we are persuaded that the decision is not restricted to the international context. Several reasons support this conclusion. First, the Supreme Court has subsequently cited *Mitsubishi* for the general proposition that antitrust claims can be arbitrated. *Gilmer*, 500 U.S. at 26-27, 111 S.Ct. at 1652.

Second, in *Mitsubishi* the Supreme Court specifically refuted the analysis of *American Safety,* confessing its "skepticism of certain aspects of the *American Safety* doctrine." *Mitsubishi,* 473 U.S. at 632, 105 S.Ct. at 3356. Initially, the Court reasoned that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id.* With respect to complexity, the Court explained that "[t]he anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Id.* at 633, 105 S.Ct. at 3357. The Court concluded that "the factor of potential complexity alone does not persuade us that an arbitral could not properly handle an antitrust matter." *Id.* at 633-34, 105 S.Ct. at 3357. Regarding arbiter bias, the Court took note that international arbitrators are frequently drawn from the legal and business communities, and "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.* at 634, 105 S.Ct. at 3358. Finally, the Court addressed "the core of the *American Safety* doctrine," that the private cause of action is fundamental to enforcing antitrust laws, by concluding that "[t]he importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court." *Id.* at 635, 105 S.Ct. at 3358. Given the Court's meticulous step-by-step disembowelment of the *American Safety* doctrine, this circuit will no longer follow *American Safety.* We hold that *Mitsubishi* effectively overruled *American Safety* and its progeny, including *Lake Communications.*

Third, *Mitsubishi* may be seen as evidence of the Supreme Court's desire to make statutory rights subject to arbitration. In

holding that claims brought under section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), and RICO, 18 U.S.C. § 1961, can be subject to arbitration, the Supreme Court noted that the "federal policy favoring arbitration" established by the FAA "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987). One scholar summed up the situation concisely:

> The reasoning used by the Court in *McMahon* to support its holding regarding the arbitrability of 1934 Act and RICO claims, however, suggests that domestic antitrust disputes are likewise subject to arbitration. . . . The *McMahon* Court made no distinction between the international and domestic arbitral forums, but rather stated that domestic and international arbitrators are equally able to handle complex statutory schemes involving treble damage remedies. Such reasoning, in combination with the FAA *can only mean*, the judicially implied *antitrust exemption to the FAA no longer exists.*

G. Richard Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA L.Rev. 623, 624 n. 7 (1988) (citations omitted) (emphasis added). Because arbitrators are not precluded from entertaining antitrust claims, Nghiem's argument fails.

V

Finally, Nghiem argues that the arbitrator's decision was

arbitrary and capricious. Not only was this argument not made in the district court, but Nghiem raises it for the first time in his reply brief. Nghiem now alleges witness perjury, procurement of arbitration award by undue means, arbitrator's manifest disregard of the law, and misconduct.

We dismiss these arguments as untimely raised. An appellate court will dismiss arguments not raised at the district court, unless there are exceptional circumstances. *FSLIC v. Butler,* 904 F.2d 505, 509 (9th Cir.1990). Nghiem does not even attempt to show exceptional circumstances.

VI

We conclude that the arbitrator had authority over the claim because Nghiem voluntarily submitted to binding arbitration and is, therefore, bound by the arbitrator's decision. The arbitrator was not precluded from deciding the Title VII and antitrust claims.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ENTERED JULY 14, 1994, DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16155

D.C. No. CV-92-20135-RMW

PETER P. NGHIEM,

Plaintiff-Appellant,

v.

NEC ELECTRONIC, INC., a California corporation; NEC CORPORATION; JAPAN (NIPPON ELECTRIC COMPANY), a Japanese corporation; HIRO HASHIMOTO; H. YOSHIZAWA, DR.; GRANT HULSE,

Defendants-Appellees.

ORDER

Before: KOZINSKI and O'SCANNLAIN, Circuit Judges; HATFIELD,* District Judge.

The panel has voted to deny the petition for rehearing. Judges

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* The Honorable Paul G. Hatfield, Chief Judge for the district of Montana, sitting by designation.

Appendix B

Kozinski and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Hatfield has so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ENTERED JUNE 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-92-20135-RMW (EAI)

PETER P. NGHIEM,

Plaintiff,

v.

NEC ELECTRONICS, INC., a California corporation, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR CONFIRMATION OF ARBITRATION AWARD AND DISMISSAL OF ACTION

The motions of defendants NEC Electronics, Inc. for confirmation of arbitration award and dismissal or, alternatively, to dismiss for failure to state a claim, or, alternatively, for summary judgment and/or summary adjudication came on regularly for hearing on May 29, 1992. The court has read the moving and responding papers and heard the oral argument of all counsel. GOOD CAUSE appearing therefor, the court finds and orders as follows.

Plaintiff Peter Nghiem ("plaintiff") began his employment with NEC Electronics, Inc. ("NEC") on August 31, 1989. On that same day, plaintiff signed a document entitled "NEC Employment,

Invention and Confidential Information Agreement". That document did not contain a provision for the arbitration of any disputes that should arise between plaintiff and NEC.

On September 5, 1989, plaintiff acknowledged receipt of the NEC Employee Handbook, as well as a letter of introduction from the Director of Human Resources at NEC. Both the letter and the handbook discuss NEC's "problem resolution process", which outlines a four-step process by which an aggrieved employee may seek redress for the resolution of problems. The handbook states that the process "applies to disputes, problems, complaints or claims (collectively, "Complaints") arising out of conduct by you or the company, your employment relationship with the company or the commencement or termination of that relationship". Step Four (4) of the process provides for the submission of the complaint to an impartial arbitrator. The provisions of Step Four state that the "decision of the arbitrator will be final and legally binding on the company and the employee to the full extent permitted by law."

Plaintiff was terminated from his position with NEC in June of 1990. Plaintiff then initiated NEC's problem resolution process and followed that process through step four. An arbitration was held before Arbitrator John Kagel in a proceeding before the American Arbitration Association. Plaintiff presented his evidence and arguments to the arbitrator, as well as a fifty (50) page "closing" brief, detailing his position.

The arbitrator issued a decision on November 18, 1991, denying plaintiff all his requested relief. Plaintiff did not move to vacate the award. Rather, plaintiff initiated this action in February of 1992 in Santa Clara County Superior Court. Defendants removed the action to this court on March 6, 1992. Defendants now

seek to confirm the arbitration award, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and dismiss this action, or, alternatively, move the court to dismiss this action or grant summary judgment and/or summary adjudication on the basis that plaintiff's claims are barred by *res judicata* and/or collateral estoppel arising from the arbitration award. Plaintiff opposes the motions on the basis that he did not agree to submit his claims to binding arbitration.

"It is a cardinal principal that arbitration is a matter of contract; arbitration cannot be compelled absent an express agreement to arbitrate". *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 664 F. Supp. 969, 971 (E.D. Pa. 1987). In this action, unlike the situation presented in *Brown,* there is evidence of an express agreement on the part of plaintiff to submit his claims regarding his alleged wrongful termination to binding arbitration. Although plaintiff did not sign an express agreement to arbitrate when he initially signed his employment agreement (and later refused to sign an employment agreement which contained an arbitration provision), plaintiff did expressly agree to arbitrate when he elected *in writing* to proceed with the NEC resolution process and, in particular, requested to proceed to step four (4) of that process, binding arbitration. As noted above, the NEC handbook specifically provides for the submission of employee complaints to *binding* arbitration. The evidence is undisputed that plaintiff voluntarily initiated this procedure. Plaintiff wrote a letter to the Director of Human Resources, Mr. Denny Mitchell, and stated, "I would like to pursue to the Step 4 of NEC's Complaint Procedure since I am not satisfied with the decision of the Executive Personnel Committee in response to my appeal in Step 3." (Exhibit Six (6) to the Denny Mitchell Declaration). As pointed out above, Step Four (4) specifically provides that the decision of the arbitrator will be legally binding and final.

Appendix C

Thereafter, plaintiff voluntarily participated in the arbitration without ever objecting to the process and/or indicating that he believed the process would be non-binding. By his express and voluntary request to proceed to arbitration, as well as his direct participation in the arbitration itself, plaintiff "accepted" NEC's "offer" in its handbook to avail himself of the arbitration process, thereby creating an express binding agreement between himself and NEC to arbitrate the dispute surrounding the termination of his employment.

In addition, plaintiff's verified complaint filed in this matter specifically incorporated the provisions of the NEC handbook which govern binding arbitration and stated that those provisions formed, at least in part, the basis of plaintiff's employment agreement with NEC. (First Amended Complaint for Damages, page 6, line 1 through 6).

Thus, plaintiff acknowledged in his complaint the existence of an agreement to arbitrate the present dispute. Plaintiff cannot now contend that no such agreement existed and that he never agreed to submit his complaint to binding arbitration. "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator." *United Steelworkers, etc. v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1980).

Accordingly,

IT IS ORDERED that defendant NEC's motion for confirmation of the arbitration award and dismissal of this action is hereby GRANTED. The arbitration award is confirmed and, based upon the confirmation, plaintiff's complaint is hereby

Appendix C

DISMISSED. NEC's alternative motions to dismiss this action, or, to grant summary judgment and/or summary adjudication, are, hereby DENIED as moot. Judgment is hereby entered against plaintiff and in favor of defendants.

DATED: JUNE 9, 1992

s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

COPIES OF ORDER MAILED ON June 9, 1992 TO:

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APPENDIX D — PETITION FOR REHEARING OF PLAINTIFF-APPELLANT WITH SUGGESTION FOR REHEARING EN BANC SUBMITTED ON JUNE 17, 1994

PETER P. NGHIEM
4324 VANDERBILT DR.
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Appellant-Plaintiff
In Pro Per

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket Number:
92-16155

Lower Court Docket Number:
CV-92-20135 RMW (EAI)

IN THE MATTER OF:

PETER P. NGHIEM,

PLAINTIFF-APPELLANT,

v.

NEC ELECTRONICS, INC., a California corporation, NEC CORPORATION (TOKYO), Japan (Nippon Electric Company), a Japanese corporation, HIRO HASHIMOTO, DR. H. YOSHIZAWA, GRANT HULSE and DOES 1-100 inclusive,

DEFENDANTS-APPELLEES.

Appendix D

PETITION FOR REHEARING OF PLAINTIFF-APPELLANT WITH SUGGESTION FOR REHEARING EN BANC

TO THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

STATEMENT OF PURPOSE

This Petition For Rehearing is made to direct the Ninth Circuit's attention to the material points of fact and law overlooked in the Court's decision rendered on June 3, 1994 affirming the District Court's ruling in favor of Defendants-Appellees. Plaintiff-Appellant respectfully requests the Court to reconsider the entire appeal in light of the applicability of the exclusion provision in 9 U.S.C. Section 1. Besides, arbitration contract obtained by fraud is unenforceable.

In reviewing this petition, the Court is asked to consider the exceptional circumstances which had forced Plaintiff-Appellant to raise the arguments on arbitrary and capricious arbitration award the first time in the Reply Brief. Supplemental facts are presented to show the Court the existence and severeness of these exceptional circumstances. The material points of fact neglected by the Court in the decision are listed in the Statement Of Counsel section.

Since the instant case is not governed by the FAA pursuant to the exclusion in 9 U.S.C. Section 1, Appellant respectfully requests that the Court reconsider his statutory right for full

judicial remedies under Title VII, Sherman Anti-Trust Act and Clayton Act. In addition, under the extraordinary circumstances shown in this petition, the Court is requested to remand the matter back to the District Court for an amended motion to vacate if it is deemed proper, and further proceedings including a trial by jury.

II.

GROUNDS FOR SUGGESTING EN BANC CONSIDERATION

The proceeding involves several questions of exceptional importance (FRAP 35, Circuit Rule 35) such as whether the exclusion provision in 9 U.S.C. Section 1 can render an arbitration award unenforceable; whether the exceptional circumstances permit the Court to consider untimely raised arguments for a remand to vacate; whether an arbitrary and capricious arbitration award with initial vacating actions construed as commencement of motion can be vacated when the statute of limitation has expired; whether an arbitration contract procured by fraud is enforceable; whether an arbitration contract as itself a product of antitrust violation conspiracy valid; whether Appellant still has statutory right to judicial remedies under Title VII and antitrust laws in spite of the procedural mistakes made by his counsel; whether an antitrust claim not ruled by the arbitrator should reach the jury where it belongs.

III.

STATEMENT OF COUNSEL

This is a petition for rehearing of Plaintiff-Appellant Peter P. Nghiem, hereinafter "Nghiem" or "Appellant", for an appeal from

a motion for confirmation of the arbitration award and dismissal of the case granted in favor of Defendants-Appellees NEC Electronics Inc., NEC Corporation (Tokyo) Japan and coemployees, hereinafter "NEC" or "Appellee(s)".

In Appellant's judgment the following material points of fact and law were overlooked in the Court's decision:

1. The Federal Arbitration Act (FAA) does not apply to the instant case because Nghiem was a worker personally "engaged in foreign and interstate commerce" under a "contract of employment" with NEC within the meaning of the exclusion provision in 9 U.S.C. Section 1.

2. The Court misinterpreted Nghiem's intent in availing himself of arbitration while he was fraudulently induced to accept a *binding* arbitration provision not included in his employment contract. Nghiem was led to believe by NEC's representations and the misleading language in NEC's company handbook that he had to exhaust all administrative procedures before he could take legal action in the State Court.

3. Arbitration was not the first step in resolving a dispute in NEC's company problem resolution process. In Step 3 of this process Appellant's complaint was reviewed by NEC's personnel committee. Step 4 of this process ordered "If you desire to pursue your Complaint further, the Complaint must be submitted to an impartial arbitrator or it is waived" (See Exhibit I, p.27 of E.R.). It is doubtful that Appellant's interests can be represented or resolved by any step of this grievance process, but Appellant still had to go through them all to exhaust the administrative remedies.

4. Nghiem availed himself of arbitration assuming that he could still have the option to file a lawsuit in the State Court

afterward since he had not signed any agreement for *binding* arbitration. At all time, Nghiem thought that arbitration is not final and legally binding on him because he had not signed any written contract to that effect.

5. Nghiem consciously avoided signing a new employment contract presented to him early in 1990, approximately five months after he joined NEC. The new employment contract contains the unambiguous *employment-at-will* language and the new *binding arbitration* provision. Nghiem did not contradict with this action when he later availed himself of arbitration believing that it was non-binding on him and it was only an administrative process to resolve the problems internally with NEC.

6. The arbitrator did not make any ruling on the antitrust issue in the arbitration award. The arbitrator presumed that the unfair trade practice claim was dropped, while Nghiem supposed that private arbitration was not the right forum for such an important issue under antitrust laws.

7. Besides the "Unfair Trade Practice" issue, several other causes of action such as "Negligent Infliction of Emotional Distress", "Unjust Enrichment" and "Conspiracy" were not fully presented and ruled at arbitration.

IV.

SUPPLEMENTAL STATEMENT OF FACTS

All the facts stated in the "Supplemental Declaration of Peter Nghiem", and "Declaration of Peter Nghiem", inclusive, are incorporated by reference. Due to the *complexity* of the case, Nghiem respectfully requests the Court to *carefully examine the*

incorporated facts supported by the "Excerpts of Record for Brief of Appellant-Plaintiff", hereinafter "E.R", and the "Supplemental Excerpts of Record for Brief of Appellant-Plaintiff", hereinafter "S.E.R.", which prove that the arbitration award is arbitrary and capricious, and Nghiem has come forward with specific material facts supporting his claims. The appeal will be incomplete without the incorporated facts.

There were *exceptional circumstances* for the Court to consider Nghiem's arguments on the arbitrary and capricious arbitrator's decision although they were raised the first time in his reply brief:

1. Nghiem's counsel, Mr. David H. Tollner, failed to timely file a motion to vacate the arbitrary and capricious arbitrator's decision in the District Court while Nghiem did not know that the court procedure required him to file such a motion. Nghiem did not think that arbitration was final and legally binding on him. Nevertheless, Nghiem did request a trial de novo and confirmed his non-binding arbitration position on November 27, 1991 (See Exhibit M, p. 34 of Excerpts of Record), shortly after the arbitration award was rendered on November 18, 1991. Subsequently, Nghiem filed the "First Amended Complaint" in Santa Clara County Superior Court on February 5, 1992 (See Exhibit S, p.63 of Excerpts of Record) to continue his lawsuit against NEC previously initiated on June 10, 1991. Nghiem did not "sit[s] idle while arbitration decision is rendered".

2. Nghiem's counsel failed to raise the argument that the arbitration award was arbitrary and capricious in the District Court although Nghiem was entitled to vacation of the irrational award on the basis of fraud, undue means, manifest disregard of the law, and evident partiality and misconduct of the arbitrator.

Appendix D

3. Nghiem wrote a letter to his counsel on April 2, 1992 presenting the important facts, arguments and exhibits to be included in the response to Defendants' motion for confirmation of arbitration award and dismissal of the case. Nghiem's counsel deliberately failed to incorporate some of these critical facts, arguments and exhibits requested by Nghiem nor cited the vital Federal Statutes supporting Nghiem's right to trial by jury in his response. On May 14, 1992, Nghiem's counsel showed him a draft copy of the "Memorandum Of Points And Authorities In Opposition To Defendant NEC Electronics, Inc.'s Motion For Confirmation Of Arbitration Award And Dismissal, . . ." which included a reference to Title VII as requested when he asked Nghiem to review and sign the "Declaration of Peter Nghiem In Opposition To Defendant NEC Electronics, Inc.'s Motion . . ." dated May 15, 1992. At that time Nghiem specifically requested his counsel again to add an argument on antitrust violation and a reference to antitrust laws. When Nghiem received the final copy of the "Memorandum Of Points And Authorities In Opposition To Defendant NEC Electronics, Inc.'s Motion . . ." which had been filed in the District Court, he was surprised that neither one of the two essential Federal Statutes under Title VII and antitrust laws highlighting the backbone issues of the case was included as requested.

4. When Nghiem found out that the District Court misinterpreted Nghiem's intent at arbitration and dismissed the case on June 9, 1992 because of procedural reasons, and because several material facts and laws pertinent to the case had not been presented to the Court, Nghiem insisted his counsel to immediately file the "Notice Of Appeal". His counsel refused to do the appeal and did not seem to represent him for his interest. Nghiem then had to get directly involved in the preparation of the appeal as he had done the same for the "First Amended Complaint". Nghiem had to

do the legal research and preparation of arguments for the appeal on his own. The briefs were reviewed, edited and approved by Nghiem's counsel for submission after Nghiem had to spend several hours to convince him of the relevancy and validity of every laws and precedent cases cited in the briefs.

5. Nghiem's counsel was reluctant to present to the Court the unlawful activities of Defendants-Appellees in violating Title VII and antitrust laws including illegal restraint of trade and price fixing until Nghiem raised the issue of obstruction of justice against him under 42 U.S.C. Section 1985(2).

6. On the hearing day of November 4, 1993 in the Ninth Circuit, Nghiem's counsel suddenly refused to do the oral argument for Nghiem in the last minute stating that he just changed his mind and no longer agreed with the content of the briefs. Knowing that his counsel were not prepared for the oral argument and might have a hidden agenda of his own, Nghiem had to persuade him to, at least, appear in the court room and submit the briefs as they stood since they were already very comprehensive, otherwise the Court would not consider the appeal. Finally, Nghiem's counsel agreed to appear in Court for Nghiem but he skipped the oral argument.

7. On June 9, 1994 at around 11:15 AM, Nghiem's counsel handed to him the decision of the Ninth Circuit, filed on June 3, 1994, and stated that he had just received it two days earlier. Nghiem's counsel then refused to file a Petition For Rehearing for Nghiem and told him to do it on his own if he desired to go any further. Since there was not enough time for Nghiem to retain a new counsel for continuance, Nghiem had to submit the Petition For Rehearing in pro per.

8. Defendants' conspiracy to mar Appellant's credibility as the key witness of their unlawful activities and deter him from coming forward and follow through with his action has not stopped since he was wrongfully terminated by NEC. This conspiracy to disguise wrongdoings and impede the due course of justice has continued throughout litigation and at Appellant's subsequent place of employment, Toshiba America Electronic Components, Inc., another Japanese subsidiary corporation in the United States, where he was again unjustly discharged on May 21, 1993 after being sexually harassed, mistreated and discriminated. On May 20, 1994, Appellant filed a lawsuit against Toshiba America Electronic Components, Inc., in Santa Clara Superior Court, Docket Case No. CV740872, which included eleven causes of action including libel and slander, and conspiracy.

V.

SUPPLEMENTAL ARGUMENT

A. FEDERAL ARBITRATION ACT DOES NOT APPLY TO CLAIMS OF DISCHARGED WORKER INVOLVED IN INTERSTATE OR FOREIGN COMMERCE AGAINST FORMER EMPLOYER IN LIGHT OF EXCLUSION PROVISION IN 9 U.S.C. SECTION 1.

Since the Court overlooked the argument on the exclusion provision in 9 U.S.C. Section 1, the arguments in Section A of Part III of the Revised Reply Brief of Appellant-Plaintiff (p.2:5-28, 3:1-28, 4:1-28, 5:1-9), inclusive, are incorporated by reference.

Appellant contends that the District Court's reliance on the Federal Arbitration Act (FAA), 9 U.S.C. Section 1 et seq., is inappropriate because the type of dispute involved in the instant case concerns

"employment contracts" of "workers engaged in foreign or interstate commerce", which are specifically excluded from the FAA. 9 U.S.C. Section 1.

The employment contract of Appellant who was directly involved in managing the sales of semiconductor products across state lines and inter-continents between Japan and the United States, fell within contracts of employment exception contained in the Federal Arbitration Act (FAA). Therefore, the District Court had no jurisdiction under FAA to compel enforcement of arbitration clause in employment contract or company handbook which was the case for Appellant whose employment contract had no arbitration provision. The exclusion provision in 9 U.S.C. Section 1 specifically provides exemption for employment contracts of workers engaged in interstate or foreign commerce. This exclusion provision applies to the instant case where Appellant was a worker engaged in both interstate and foreign commerce.

Appellant had an employment contract with NEC Electronics, Inc., a California corporation, which is a wholly owned subsidiary of NEC Corporation in Tokyo, Japan. NEC manufactures and markets products internationally and throughout the United States. Appellant's office was based in Mountain View, California, but his product management and sales promotion activities cover a large territory including most parts of the United States. Appellant was in charge of setting up and promoting the sales of ASIC foundry (COT, Customer Owned Tooling) business in the United States in addition to the sales of ASIC (Application Specific Integrated Circuit) products. Appellant also managed CAD (Computer Aided Design) strategic marketing activities including product planning, development of CAD product strategies, and negotiation of corporate CAD development and purchase contracts with U.S

CAD vendors nationwide. Appellant was required to travel across the country and to Japan in the performance of his job. The semiconductor products he managed were manufactured in Japan and in Roseville, California and were shipped to customers throughout the United States (See Exhibit L, p.83-84 of S.E.R.). Therefore, NEC's business and Appellant's work projects involving sales and shipment of semiconductor products constituted a transaction involving commerce within the meaning of 9 U.S.C. Sect. 1 & 2.

The applicability of the statutory exclusion in 9 U.S.C Section 1 to the instant case was supported by the holdings of several courts in numerous precedent cases. In *Copley v. NCR Corporation,* 394 S.E.2d 751 (1990, W.Va), the Supreme Court of Appeals of West Virginia held that the Circuit Court had no authority to compel enforcement of arbitration clause in employment contract since Copley, a sales representative, was involved in computer sales across state lines pursuant to the exclusion provision in 9 U.S.C. Section 1. In a more recent case, *Rosen v. Transx LTD.*, 816 F.Supp. 1364 (D.Minn. 1993), the court ruled that Federal Arbitration Act (FAA) did not apply to a truck driver who was engaged in interstate commerce.

Employment contracts of members of a "class of workers engaged in interstate commerce" as defined in 9 U.S.C. Section 1 are excluded from the application of the Federal Arbitration Act (FAA). Even collective bargaining agreements are also considered as contracts of employment within the meaning of this exclusion. In *Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir.), 110 S.Ct. 1319 (1990), an employment contract involving airline pilots is excluded. In *United Food and Commercial Workers v. Safeway Stores, Inc.*, 889 F.2d 940, 944 (10th Cir.1989), agreement involving grocery store worker is excluded. In , and *American*

Appendix D

Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466 (11th Cir. 1987), agreement involving postal service employee is excluded. In *Central States Pension Fund v. Tank Transport*, 779 F.Supp. 947 (N.D.Ill. 1991), contract involving truck driver is excluded. In *United Electrical, R. & M. Wkrs. v. Miller Metal Prod.*, 215 F.2d 221 (4th Cir.1954), collective bargaining agreement involving electrical workers is excluded.

Although the United States Supreme Court has not clearly explained the meaning of the contracts of employment exception in any of the court's decisions, the court did distinguish a securities registration application from an employment agreement and held that Section 1 exclusionary clause does not apply to the Gilmer's arbitration agreement in *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct. 1647 (1991). *Gilmer* did not involve an arbitration clause contained in an agreement between an employee and employer. Gilmer's arbitration agreement was in a securities representative's securities registration application.

The court in *Agostini Bros. Building Corp. v. United States*, 142 F.2d 854 (4th Cir.) pointed out that Congress in enacting the Federal Arbitration Act (FAA) was endeavoring to exercise the full extent of its power with relation to the subject matter. There is no reason to think that it was not intended that the exception incorporated in the statute should not reach also to the full extent of its power. In *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 405 (6th Cir.1988), the 6th Circuit ruled that the individual worker did not have to be personally engaged in interstate commerce to have his claim excluded from FAA as long as he belonged to a "class of worker engaged in interstate commerce". In the instant case, Appellant was directly involved not only in interstate commerce but also in foreign commerce as the computer sales representative in *Copley v. NCR Corporation*, 394 S.E.2d 751 (1990, W.Va), therefore his claims should not be governed by the FAA.

Appendix D

In short, under Section 1 of the Federal Arbitration Act (FAA) an exemption is provided for employment contracts of workers engaged in interstate or foreign commerce, Appellant's employment contract falls within the exemption of the exclusion provision. Accordingly, the District Court has no jurisdiction under the FAA to enforce the arbitration clause in NEC's company handbook. Under 28. U.S.C. Section 1447(c), the court must determine whether it has subject matter jurisdiction over the case. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded". Since the District Court lacks subject matter jurisdiction, the court will be compelled under 9 U.S.C. Section 1447(c) to remand the case for further proceedings.

Having established that the Federal Arbitration Act (FAA) does not apply to the instant case, this Court is asked to revisit Appellant's right to pursue judicial remedies under Title VII and Sherman Anti-Trust Act and Clayton Act for all of his claims.

B. SINCE THERE WERE EXCEPTIONAL CIRCUMSTANCES FOR UNTIMELY RAISED ARGUMENT, THE COURT IS RESPECTFULLY REQUESTED TO CONSIDER APPELLANT'S ARGUMENTS ON THE ARBITRARY AND CAPRICIOUS ARBITRATOR'S DECISION.

In the Supplemental Statement Of Facts, section III of this Petition For Rehearing, Appellant has shown exceptional circumstances for the Court not to dismiss Appellant's arguments on the arbitrary and capricious arbitration award. Appellant should not be penalized for the mistakes made by his counsel either intentionally or by negligence. Therefore, Appellant respectfully requests the Court to review and consider the entire Section D and

Appendix D

E of Part III of the Revised Reply Brief of Appellant-Plaintiff (p.15-24), which, inclusive, are incorporated by reference.

Although Appellant's counsel failed to file a motion to vacate the arbitration award in the District Court, Appellant had timely commenced the vacating action by requesting the arbitrator for a trial de novo and filing the "First Amended Complaint" within the three-month period. Appellant respectfully requests the Court to remand the matter back to the District Court for further proceedings and an amended motion to vacate the arbitration award if it is now deemed proper and necessary.

C. APPLICATION OF ARBITRATION PROVISION CAN BE SUSPENDED WHEN ALLEGATION OF FRAUD IN THE INDUCEMENT RELATING SPECIFICALLY TO ARBITRATION PROVISION EXISTS.

According to Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A., Appellant can seek to avoid arbitration clause on ground that he was fraudulently induced to assent to arbitration clause. Appellant never intended to agree to final and legally binding arbitration. He never signed any contract for binding arbitration. But he was fraudulently induced to enter into such agreement by being requested to follow the four steps of NEC's company problem resolution process (See Declaration of Peter Nghiem, p.2:16-28, p.3:1-28, p.4:1-10 and Statement of Facts in Brief of Appellant-Plaintiff, p.11:8-28, p.12:1-28). Therefore, the binding arbitration provision in NEC's company handbook is invalid and unenforceable because it was induced by fraud.

A claim of fraud in the inducement of the entire contract containing an arbitration clause is properly referred to arbitration pursuant to Section 3 of the Federal Arbitration Act. However,

"allegations of fraud in the inducement relating specifically to an arbitration provision may suspend application of such provision." *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835,837 (10th Cir.1988). A plaintiff attempting to avoid an arbitration clause on the basis of fraud must plead fraud with the specificity required by Fed.R.Civ.P. 9(b). See *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.1992).

Appellant's allegations regarding the arbitration clause are clear and non-speculative. His allegations related specifically to the binding arbitration clause in NEC' s company handbook, and thus they are sufficient to state fraud with the particularity required by Fed.R.Civ.P. 9(b). Therefore, the Court is requested to dismiss the enforcement of that provision.

D. ARBITRATION OF ANTITRUST CLAIM IS NOT ENFORCEABLE WHEN THERE WAS ALLEGATION THAT CONTRACT ITSELF WAS PRODUCT OF VIOLATION OF ANTITRUST LAWS.

Although the Court has ruled that antitrust claims may be arbitrated, the Court must still determine what claims the parties intended to submit to arbitration. The antitrust claim was not included in Appellant's Closing Brief at arbitration (See Exhibit A, p.1-48 of S.E.R.). Appellant supposed that private arbitration was not the right forum for his claims under antitrust laws while the arbitrator did not rule on this issue in the award. The Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238 (1985), held that the parties' intent governs "even if the result is 'piecemeal' litigation".

Appellant's employment contract itself was a product of NEC's violation of antitrust laws. Since Appellant was

fraudulently enticed to accept an employment contract with hidden agenda of being used as a scapegoat for the illegal restraint of trade of NEC during the period from 1989 to 1990, the arbitration of his antitrust claim is unenforceable. In *Armco Steel Co., L.P. v. CSX Corp.*, 790 F.Supp. 311 (D.D.C. 1991), defendants were sued for engaging in a conspiracy to artificially inflate costs and restrain trade in violation of Section 1 and 3 of the Sherman Act, 15 U.S.C.. The District Court of District of Columbia held that parties were not required to arbitrate when there was allegation that contract itself was product of violation of antitrust laws.

While federal policy strongly favors arbitration, there are instances when arbitration would further manifest injustice as it did in the instant case. When the contract requiring binding arbitration is obtained by fraudulent inducement, the goals of the Federal Arbitration Act (FAA) are destroyed. The *Armco* Court held that requiring a party who alleges to have been coerced into a contract, at least when there are allegations of antitrust violations, would be inequitable.

In *Armco,* steel producer's agreement to submit claims under contract to arbitration did not obligate it to arbitrate antitrust disputes arising prior to execution of contract despite its alleged knowledge of defendant's prior antitrust violations. 9 U.S.C. Section 3. Further, a party's agreement to arbitrate disputes "arising under or relating to" one contract does not obligate it to arbitrate disputes arising under a separate contract. See *In re Hops Antitrust Litigation,* 655 F.Supp. 169, 171-72 (E.D.Mo.1987).

An arbitration clause is not applicable to complaint for actions taken prior to execution of contract providing for arbitration of "any controversy . . . arising out of or relating to [] contract". See *Church v. Gruntal & Co.,* 698 F.Supp 465, 469

(S.D.N.Y.1988). In the instant case, Appellant had made several complaints to NEC's Human Resources Department about the unusual and unreasonable restraint of trade activities prior to his termination and arbitration. If his participation in arbitration is construed as entering into the arbitration clause in NEC's company handbook, he is still not obligated to arbitrate the antitrust claim.

Appellant's causes of action of "Unfair Trade Practice" and "Conspiracy" under antitrust laws are not determinable without trial and are best left to the jury or further discovery to resolve.

VI.

CONCLUSION

Federal Arbitration Act (FAA) does not apply to claims of Appellant, a discharged worker, against NEC, a former employer, in light of the exclusion of contracts of any class of workers engaged in interstate and foreign commerce pursuant to 9 U.S.C. Section 1. Since the Federal Arbitration Act (FAA) does not apply to the instant case, the District Court lacks subject matter jurisdiction to enforce the arbitration award. Moreover, arbitration contract secured by fraud is not enforceable.

In addition, affirming the District Court's judgment to confirm the arbitration award and dismiss Appellant's action in its entirety relying on any of NEC's grounds would manifest injustice and abuse of discretion because the arbitrator's decision is arbitrary and capricious. Based on the pertinent points of fact and the exclusion provision in 9 U.S.C. Section 1 in addition to the exceptional circumstances presented in this petition, Appellant respectfully requests that this Court RECONSIDER the entire appeal, REVERSE the judgment of the District Court and

Appendix D

REMAND the matter for *an amended motion to vacate* and further proceedings including *a trial by jury.*

I declare under penalty of perjury that the facts set forth in this Petition For Rehearing is true and correct of my own knowledge.

Respectfully submitted,

s/ Peter Nghiem
PETER NGHIEM
Plaintiff-Appellant
In Pro Per

DATE: June 17, 1994

APPENDIX E — REVISED REPLY BRIEF SUBMITTED ON DECEMBER 28, 1992

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket Number:
92-16155

Lower Court Docket Number:
CV-92-20135 RMW (EAI)

IN THE MATTER OF:
PETER P. NGHIEM,
Appellant-Plaintiff,

v.

NEC ELECTRONICS, INC., a California corporation, NEC CORPORATION (TOKYO), Japan (Nippon Electric Company), a Japanese corporation, DR. H. YOSHIZAWA, GRANT HULSE and DOES 1-100 inclusive,

Appellee-Respondents.

Revised Reply Brief of Appellant-Plaintiff

Appendix E

TO THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

I. STATEMENT CONCERNING ISSUES

In this appeal, several issues related to Appellant-Plaintiff's right to a trial by jury are presented to the United States Court of Appeal for the Ninth Circuit. The main issue is whether the District Court had jurisdiction and did not abuse its discretion in granting Appellee-Respondents' motion for confirmation of the arbitration award and dismissal of Appellant-Plaintiff's action.

In reviewing the appeal, this Court is asked to determine whether the Federal Arbitration Act governs the case in the absence of a valid executed contract for binding arbitration and in spite of the applicability of the exclusion provision in 9 U.S.C. Section 1. Since the arbitration award was arbitrary and capricious, the Court is requested to remand the matter back to the District Court for an amended motion to vacate and further proceedings. In addition, the Court is asked to review whether Appellant-Plaintiff's statutory right for federal judicial remedies under Title VII amended by the Civil Rights Act of 1991, Sherman Anti-Trust Act and Clayton Act permits him to secure a trial by jury for his claims of employment discrimination and antitrust violation against Appellee-Respondents.

II. SUPPLEMENTAL STATEMENT OF FACTS

All the facts stated in the attached **"Supplemental Declaration of Peter Nghiem"**, hereinafter "S.D.P.N.", and **"Declaration of Peter Nghiem"**, hereinafter "D.P.N.", inclusive, are incorporated by reference. Due to the *complexity* of the case,

Appendix E

Nghiem respectfully requests the Court to *carefully examine the incorporated facts* supported by the "Excerpts of Record for Brief of Appellant-Plaintiff", hereinafter "E.R", and the "Supplemental Excerpts of Record for Brief of Appellant-Plaintiff", hereinafter "S.E.R", which prove that the arbitration award is arbitrary and capricious, and Nghiem has come forward with specific material facts supporting his claims. *The appeal will be incomplete without the incorporated facts.*

III. ARGUMENT

A. FEDERAL ARBITRATION ACT DOES NOT APPLY TO THE INSTANT CASE WHERE APPELLANT-PLAINTIFF HAD A CONTRACT OF EMPLOYMENT WITHIN THE MEANING OF THE EXCLUSION IN 9 U.S.C. SECTION 1.

NEC's assertion that the Federal Arbitration Act (FAA) governs the instant case is incorrect. The FAA does not apply to the instant case because a valid executed contract for binding arbitration does not exist and Nghiem's employment contract falls within the contracts of employment exception of the FAA. Consequently, the District Court wrongfully confirmed the arbitration award pursuant to the FAA.

The exclusion in Section 1 of the FAA, 9 U.S.C. Section 1 (1947), which clearly states that "nothing herein contained shall apply to contracts of employment of . . . *any other class of workers engaged in foreign or interstate commerce*", is applicable to the instant case. Nghiem had an "employment contract" with NEC Electronics, Inc., a California Corporation, which is a wholly-owned subsidiary of NEC Corporation in Tokyo, Japan. NEC manufactures and markets products internationally and throughout

the United States (Exhibit L , p.83-84 of S.E.R.). Nghiem was assigned to create the infrastructure to support and expand ASIC foundry (COT) (Customer Owned Tooling) business in the U.S., to promote the sales of ASIC products, and to manage CAD strategic marketing activites including negotiation of corporate purchase contracts with U.S. CAD vendors (See Brief of Appellant-Plaintiff, 8:1-28; Exhibit A, p.6 of S.E.R.).

NEC's business, particularly Nghiem's work projects, involving sales and shipment of semiconductor products manufactured both in Japan and in Roseville, California, to customers throughout the U.S. constitutes "a transaction involving commerce" within the meaning of Section 2. The term "commerce" is defined in Section 1 of the FAA as follows:

> " '[C]ommerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation,"

Therefore, Nghiem was a "worker[s] engaged in foreign or interstate commerce" within the meaning of 9 U.S.C. Section 1.

The application of the statutory exclusion in 9 U.S.C. Section 1 to the instant case was substantiated by the recent opinion of the Supreme Court of Appeals of West Virginia in *Copley v. NCR Corporation,* 394 S.E.2d 751 (1990, W.Va). In *Copley,* the employment contract of a sales representative who sold computer merchandise across state line, was ruled as falling within the contracts of employment exception of the FAA. Thus, the circuit

court had no authority under the FAA to compel enforcement of the arbitration clause in Mr. Copley's employment contract.

A general collective bargaining agreement was held to be a "contract of employment" within the meaning of the exclusion provision in 9 U.S.C. Section 1 by the Supreme Court in *United Paperworkers International Union v. Misco, Inc.*, 108 S.Ct. 364, 98 L.Ed.ed 286 (1987). Additionally, with the Supreme Court's guidance in *United Paperworkers,* several circuits courts have determined that the exclusion of Section 1 is appropriate for labor contracts. See *American Postal Workers Union, AFL-CIO v. United States Postal Services*, 823 F.2d 466, 473, (11th Cir.1987); *Bacashihua v. United States Postal Services,* 859 F.2d 402 (6th Cir.1988); *Occidental Chemical Corp. v. Local 820 International Chemical Workers Union,* 853 F.2d 1310 (6th Cir.1988); *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir.1989). The Court in *American Postal Workers Union*, 823 F.2d 466 (11th Cir.1987), held that postal workers who are responsible for mail items moving in "interstate commerce" on a daily basis, are "engaged in interstate or foreign commerce" within the meaning of the statutory exclusion, and thus, the FAA does not apply. In *Bacashihua, 859 F.2d 402 (6th Cir.1988)*, the Court ruled that the FAA does not apply to the claim of a post office employee who brought action challenging dismissal, *even though he was not personally engaged in interstate commerce.*

On pages 11 and 27 of the "Brief of Defendant-Appellee", NEC deliberately misled the Court to believe that Nghiem had contradicted his own sworn statement by playing words to distort the content of Nghiem's claim in paragragh 4 and 4(c) at pages 4 and 6 of Nghiem's First Amended Complaint. To get the record straight, this is far from accurate. Nghiem actually contends that

there was no "express, executed agreement for *binding* arbitration". In addition, the record reveals that *at no place* in paragragh 4 and 4(c) at pages 4 and 6 of the First Amended Complaint did Nghiem "make[s] sworn statement that he relied upon the binding arbitration policy of NECEL as part of his basis for claiming . . .". Nghiem objects the *meritless defense* of NEC in this far-fetched insinuation of an "Appellant's statement" that does not exist.

Based on the facts presented by the parties, the inapplicability of the FAA is well established since Nghiem was a worker personally "engaged in foreign and interstate commerce" under the "Contract of Employment" with NEC (Exhibit L, p.83-84 of S.E.R.), which was a "contract of employment" within the meaning of the exclusion. Besides, the FAA's requirements were not satisfied because of the following reasons:

1) Nghiem's "Contract of Employement" with NEC does not contain an arbitration clause;

2) Nghiem's letter to Mr. Denny Mitchell requesting to proceed with step 4 of NEC Problem Resolution Process is not a valid executed written agreement for binding arbitration;

3) At no time, did Nghiem either intend or agree to subject himself to legally binding and final arbitration;

4) Nghiem was fraudulently induced to avail himself of arbitration by NEC's representations and the misleading language in NEC's company handbook;

5) The arbitration clause in NEC's company handbook is not part of Nghiem's "Contract of Employment" with NEC.

Consequently, the instant case should not have been decided under the FAA. The District Court's reliance on the FAA to confirm the arbitration award was misguided. Nghiem respectfully requests that this Court overturn the District Court's ruling and allow this case to reach a jury.

B. AN ADVERSE DECISION UNDER A PRIVATE ARBITRATION PROCEDURE DOES NOT FORECLOSE AN EMPLOYEE FROM PURSUING A DISCRIMINATION CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE CIVIL RIGHTS ACT OF 1991.

NEC argues that the FAA applies to the instant case and, therefore, the FAA is appropriate for the resolution of Title VII claims. NEC completely ignores, however, the *Civil Rights Act of 1991* which amended *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. 2000e et seq., allowing victims of intentional discrimination seeking compensatory or punitive damages to secure a jury trial.

NEC's reliance on the line of cases of *Gilmer v. Interstate/ Johnson Lane Corp.*, 111 S.Ct. 1647 (1991) and *Spellman v. Securities, Annuities & Insurance Services, Inc.*, 8 Cal.App.4th 452 (July 1992) to support the District Court decision to confirm the irrational arbitration award is misplaced. The Courts in *Gilmer* and *Spellman* actually held that the exclusion in FAA did not apply to arbitration agreements in securities registration applications.

The other cases cited by NEC fall into the same category as *Gilmer* and *Spellman* where an arbitration clause exists in the employment contract and the cases were decided under the FAA. None of those cases conform to the facts and the situation of the instant case where the FAA does not apply. Therefore, those cases

provide no basis for refusing Nghiem's right to federal judiciary remedies under Title VII.

NEC did concede that the *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974), cited by Nghiem, was not decided under the FAA. In *Alexander,* the Supreme Court held that an adverse decision under a collective bargaining arbitration procedure would not foreclose an employee from pursuing a discrimination claim under Title VII of the Civil Rights Act of 1964. The *Alexander* Court noted that the legislative history of Title VII "manifests a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Id., at 1019 (emphasis added). The Court also stated that the "choice of forums inevitably affects the scope of the substantive right to be vindicated". Id., at 1023 (Citing *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 91 S.Ct. 409 (1971), and concluded that "federal policy was best accommodated by permitting an employee to pursue fully remedies under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII." Id., at 1025-1026. The Court clearly and directly addressed its intent to "permit[ting] an employee" and "allow[ing] an individual" to pursue both remedies.

Along the same line, in *Davis v. Kitt Energy Corp.*, 365 S.E.2d 82 (1987) where a coal miner raised a claim of retaliatory discrimination under W.Va.Code, 22A-1AA-20, alleging that he had been removed from the mine safety committee for reporting safety violations, the Court stated in Syllabus Point 4 of the case that:

> "A miner against whom an arbitration decision has been rendered under a collective bargaining agreement involving a safety claim

is not foreclosed from pursuing a discrimination remedy under W.Va.Code, 22A-1A-20."

The Supreme Court in *Alexander* emphasized that the arbitration clause could not supersede or waive important statutory rights such as Title VII. Following this reasoning, the Supreme Court of Appeals of West Virginia in *Liller v. West Virginia Human Rights Commission,* 376 S.E.2d 639 (1988) held that the filing of a civil service claim does not foreclose a female deputy sheriff from subsequently pursuing a sex discrimination claim. Similarly, the same Court in *Copley v. NCR Corp.,* 394 S.E.2d 751 (1990, W.Va) ruled that an arbitration clause in an employment contract could not defeat a human rights action by a sales representative alleging age and sex discrimination pursuant to a notice of right to sue.

Even where an employee is subject to the FAA, the contractual obligation to submit to arbitration cannot override or defeat a civil rights claim. See *Utley v. Goldman Sachs & Co.,* 883 F.2d. 184 (1st Cir. 1989), cert. denied, 110 S.Ct. 842 (1990); *Nicholson v. CPC Int'l, Inc.,* 877 F.2d 221 (3rd Cir.1989); *Swenson v. Management Recruiters Int'l, Inc.,* 858 F.2d 1304 (8th Cir.1988), cert. denied, 110 S.Ct. 143; *Cooper v. Asplundh Tree Expert Co.,* 836 F.2d 1544 (10th Cir.1988); *Steck v. Barner, Upham & Co., Inc.,* 661 F.Supp 543 (D.N.J.1987); *Criswell v. West. Airlines., Inc.,* 709 F.2d 544 (9th Cir.1983), 105 S.Ct. 2743 (1985).

As clarified in *Alexander,* Congress has made the policy against discrimination "a highest priority," Id., at 1019. The *Utley* Court ruled that an employee could not waive prospectively her right to a judicial forum at any time, regardless of the type of employment agreement which she signed. Id., at 187. In distinguishing statutory right from contractual right in employment discrimination cases, the Supreme Court in

Appendix E

Barrentine v. Arkansas-Best Freight Sys., 101 S.Ct.1437(1981), stated:

> "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forum." Id., at 1447.

Congress has embodied its intention in line with *Alexander* and *Barrentine,* in enacting the *Civil Rights Act of 1991* on November 21, 1991. The Act significantly alters existing law. In amending Title VII of the *Civil Rights Act of 1964,* the Civil Rights Act of 1991 focuses on one principle thrust to reverse the effect of a number of Supreme Court decisions issued from 1989, which were perceived by Congress to have unduly narrowed the rights of individuals to protect themselves from employment discrimination. Nghiem's right to a trial by jury is preserved by *Section 102* of the Civil Rights Act of 1991 which clearly stated that "if a complaining party seeks compensatory or punitive damages under this section—*any party may demand a trial by Jury.*"

Section 107 of the Civil Rights Act of 1991, reverses previous court holdings that allow an employer to avoid liability for intentional discrimination in "mixed motive" cases if the employer could demonstrate that the same challenged action would have been taken even without the discriminatory motive. NEC acted with "mixed motives" in the instant case, where motivating reasons for NEC's animosity against Nghiem were Appellees' discriminatory attitude toward him and hidden endeavor to claim his work credit as their own. Moreover, NEC used Nghiem, a

Vietnamese-American, as a "scapegoat" in its conspiracy to illegally restrain trade. Regardless of the motives, Nghiem was harrassed, humiliated, intimidated and mistreated by NEC, both in private and in public, because of his race and national origin.

As adapted to a race discrimination discharge claim, Nghiem established a prima facie case by showing:

> (1) he is within the protected minority group, Vietnamese-American, (2) he was doing satisfactory work, (3) he was discharged despite the adequacy of his work and his outstanding performance, (4) he was not considered for promotion as promised despite his solid qualification in work accomplishments, industry experience and academic background, (5) he was exposed to a hostile work environment, (6) he was wrongfully terminated for unwarranted reasons, and (7) his position was filled by a white person with much less experience and qualification than him.

Such unfair treatment by NEC, in violation of the *Glass Ceiling Act of 1991*, establish a prima facie case of race discrimination, allowing Nghiem the Jury forum that the amended Title VII provides.

In short, NEC's argument relying on *Gilmer* and its line of case to preclude judicial remedies of Nghiem's Title VII claim is misplaced because the instant case is not subject to the FAA. An adverse decision under a private arbitration procedure does not foreclose Nghiem from pursuing his employment discrimination

claim in a judicial forum. Moreover, the Civil Rights Act of 1991 permits Nghiem, a victim of intentional discrimination seeking compensatory and punitive damages, to secure a trial by jury, whether the FAA applies or not.

C. AN ARBITRATION AWARD CONTRARY TO ESTABLISHED AMERICAN PUBLIC POLICY UNDER ANTITRUST LAWS IS NOT ENFORCEABLE, PARTICULARLY WHEN THE MERITS OF THE CLAIMS ARE CONTROLLED BY AMERICAN LAW.

NEC relies solely on the holding of the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985) to rebut Nghiem's argument on the unenforceability of an agreement to arbitrate antitrust disputes. NEC also questioned the validity of *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) and nine other precedent cases cited by Nghiem in which the Court of Appeals uniformly held that rights conferred by the antitrust laws are inappropriate for enforcement by arbitration. Id. NEC *misread* and *misapplied* the holding of *Mitsubishi Court* to the instant case by not recognizing the significant differences between the two cases.

The *Mitsubishi* Court assumes for the purpose of its decision that the antitrust issues would not be arbitrable if this were a purely domestic dispute (Id. 3355), but hold that the international character of the controversy makes Soler's antitrust claim arbitrable. The *Mitsubishi* Court found it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. This decision was dissented by Justice Stevens, Justice Brennan and justice Marshall, who emphasized that the *United States Federal*

statutes should be applied if the merits of the claims are controlled entirely by American law. Id., at 3361-3373.

In the instant case, Nghiem's cause of action under *Clayton Act,* 15 U.S.C. Section 4, as an employee unjustly discharged for whistleblowing and refusal to participate in NEC's unfair trade practice is governed entirely by American law, particularly when the key defendant, NEC Electronics, Inc., is a California Corporation.

The *Mitsubishi* Court sought refuge in the application of its own precedent case *Scherk v. Alberto-Culver Co.,* 94 S.Ct. 2449 (1974), to defend its position that if the arbitration clause were not enforced, a host of international conflict of laws problems would arise. That is not a concern in the instant case. Nghiem's case is distinctly different than *Scherk* since the outcome is governed entirely by American law as it was in *Wilko v. Swan,* 74 S.Ct. 182 (1953). The antitrust violation perpetrated by NEC Corporation in Tokyo, Japan, through conspiracy with its wholly owned subsidiary NEC Electronics, Inc. in Mountain View, California,[1] to restrain trade directly injured American PC chipset suppliers and ASIC customers in the United States. Although Nghiem was not the object of anticompetitive conduct, he was still directly injured because he was used as an essential element to fulfill NEC's secret plan to illegally restrain trade. The unlawful restraint of trade involved the delay in technology transfer and the hampering of the formation of an infrastructure in the U.S. to support ASIC foundry (COT) business in the United States. NEC restricted production at the domestic manufacturing facility in Roseville, California, to

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1. Conspiracy with its wholly owned automobile distributorships to restrain trade constitutes a violation of antitrust law spursuant to Sherman Act. See *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338 (1975).

keep pricing and production capacity controlled by NEC Corporate in Tokyo to effectively restrain trade to the detriment of U.S customers.[2] [3]

Although Nghiem's job function involved foreign and interstate commerce, the relationship between Nghiem and NEC is bound by an employment contract with NEC Electronics, Inc., a California Corporation wholly owned by NEC Corporation in Tokyo, Japan (Exhibit L, p.83-84 of S.E.R.). Foreign companies

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2. The Supreme Court has ruled that price fixing is prohibited per se, regardless of the procompetitive justifications offered. See *United States of America v. A. Lanoy Alston, D.M.D., P.C.*, No. 91-10040, D.C. No. VR-90-00042-ACM (9th Cir. Filed in San Francisco, CA, on September 1992) where the Court of Appeals held that dentists who conspired to fix prices received from health plan insurers for dental work to plan-member patients violated Section 1 of the Sherman Act per se. The Court instructed the jury on the per se nature of price fixing as follows:

> "Under Sherman Act, price fixing is per se illegal. If you find there was a conspiracy to fix co-payment fees, it does not matter why the fees were fixed or whether they were too high or low; reasonable or unreasonable; fair or unfair. It is not a defense to price fixing that the defendants may have had good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. You may not consider any justification for fixing the fees." Id., at 10994. (Id., at 3349)

3. The Supreme Court made clear that the per se condemnation of price fixing is a substantive rule of antitrust law, not merely a device of administrative convenience in its holding that the lawyers' boycott was "a plain violation of the antitrust laws". See *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) (SCTLA). [Price-fixing agreements] are all banned because of their actual or potential threat to the central nervous system of the economy," Id., at 435 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940))

engaged in business in the U.S. must comply with American law as in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 102 S.Ct. 2374 (1982) where Japanese general trading company's wholly owned subsidiary which is incorporated in the U.S., is not exempt under bilateral commercial treaty from obligations under Title VII of the Civil Rights Act of 1964. Id., at 3373.

In the instant case, Nghiem had an employment contract with NEC Electronics, Inc., a California Corporation located in the U.S.. In *Mitsubishi,* Soler signed an explicit written Sales Procedure Agreement with Mitsubishi Motors Corporation, a Japanese corporation located in Japan. In addition, Soler's dealership agreement with Mitsubishi Motors Corp. contains a specific arbitration provision that requires "[a]ll disputes . . . [to] be *finally settled by arbitration in Japan* in accordance with the rules and regulations of the Japan Commercial Arbitration Association." Id., at 52-53.

The *Mitsubishi* Court concluded that the arbitration clause in that agreement encompassed the antitrust claim because Mitsubishi's defense to the antitrust allegation was based on provisions in the dealer's Sale Procedure Agreement. Id. However, the Court also recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather a judicial forum." Id., at 3354.

In the instant case, first of all, Nghiem's "Contract of Employment" does not contain an arbitration provision (See Brief of Appellant-Plaintiff, 11:8-28; 12:1-7). Taking a close look at the record, one would find that Nghiem never agreed to legally binding and final arbitration either orally or in writing.

Nothing in the text of the 1925 Federal Arbitration Act, nor its

legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims. Id., at 3364. The express statutory remedy provisions in the *Ku Klux Act of 1871,* the *Securities Act of 1933,* the *Fair Labor Standards Act,* the *Title VII of the Civil Rights Act of 1964* and the *Civil Rights Act of 1991,* and the antitrust laws, individually and collectively provided the Court with convincing evidence that Congress did not intend the protection of federal public policy to be administered by a private arbitrator. Id., at 3366. Particularly, when the arbitrator displays partiality and lack of competency in federal statutes as he did in the instant case.

NEC's simplistic conclusion that "Appellant's argument is thus baseless and wholly without merit" (See Defendant-Appellee's Brief, 19:3), is unwarranted and misleading in the light of substantial number of precedent supporting cases and preponderant credible evidence.[4] The Supreme Court ruling in *Mitsubishi* did not "foreclose" the importance of *American Safety* and its line of cases because of the significant difference in international character of *Mitsubishi-Soler,* which led the Court to enforce the specific written agreement to arbitrate all disputes in Japan. Significantly, the Court in *Mitsubishi* noted "[t]hat is not to say that all controversies implicating statutory rights are suitable for arbitration." Id., at 3354. Nothing in *Mitsubishi* suggests that the Court was overruling its prior holdings that arbitration agreements do not preclude access to a judicial forum for resolution of claims arising under antitrust claims.

Having established the main differences between *Mitsubishi* and the instant case, Nghiem reasserts that his cause of action of

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4. In order to present additional evidence to the existence of antitrust violation perpetrated by NEC, some trade secrets will have to be disclosed by the witnesses which could only be done properly through discovery and trial by Jury.

antitrust violation against NEC entitles him to a trial by jury. Nghiem's argument on antitrust disputes is strongly supported by the holding of *American Safety* and its line of cases (Nghiem cited nine other precedent cases in his original brief) which are more thoroughly aligned with the instant case than is *Mitsubishi.*

The Ninth Circuit in *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (1984) held that the complexity of antitrust issues and the significant public interest in antitrust enforcement, in addition to the limited expertise of the arbitrators, the limited scope of arbitrators' authority to decide issues and the procedural differences between arbitral and judicial factfinding, are reasons for denying preclusive effect to an arbitration decision on antitrust issues. This view is consistent with the previous ruling of the same Circuit in *Varo v. Comprehensive Designers, Inc.*, 504 F.2d. 1103 (9th Cir. 1974) holding that arbitration of fraud in the inducement count would be stayed pending final resolution of antitrust issues.

Since the FAA does not apply in the instant case, the court has no authority to compel enforcement of arbitration award of antitrust claim under the FAA. Even if the FAA governs the instant case, the irrational and unfair arbitration award contrary to American public policy under antitrust laws was unenforceable. Since Nghiem was unjustly discharged for whistleblowing and refusal to participate in NEC's conspiracy to illegally restrain trade in violation of public policy under the Sherman Act and Clayton Act, he is entitled to a trial by jury on that issue.

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN CONFIRMING THE ARBITRATION AWARD WHICH WAS ARBITRARY AND CAPRICIOUS. APPELLANT-PLAINTIFF IS ENTITLED TO VACATION OF THE AWARD ON THE BASIS OF FRAUD, UNDUE MEANS, MANIFEST DISREGARD OF THE LAW, AND EVIDENT PARTIALITY AND MISCONDUCT OF THE ARBITRATOR.

1. The District Court cannot confirm the arbitrary and capricious award which was procured by the abuse of discretion and evident partiality of the Arbitrator.9 U.S.C. Section 10(b),(d).

Based on the reasons presented in the "*Supplemental Declaration of Peter Nghiem*" and "*Declaration of Peter Nghiem*", Appellant contends that the arbitration award was "arbitrary and capricious". See *United States Postal Service v. National Assoc. Of Letter Carriers, AFL-CIO,* 847 F.2d 775 (11th Cir.1988). Nghiem was prejudiced in not being able to contest his termination on the merits and procedure in arbitration proceeding because of the evident partiality and misconduct of the Arbitrator.

Moreover, the arbitration award in the instant case was repugnant to public policy. The Arbitrator abused its discretion in rendering an irrational arbitration award contrary to American public policy under Title VII and antitrust laws. Although Nghiem presented his claim of antitrust violation against NEC in his written complaint and during the arbitration proceeding, the Arbitrator incorrectly determined that Nghiem had abandoned his claim because the issue was not addressed in the closing brief. The Supreme Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358 (1960) held that:

"[A]n arbitrator is confined to interpretation

> and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . When the arbitrator's word manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Emphasis added.)

The Supreme Court has also noted that "the question of public policy is ultimately one for resolution by the courts . . .; a court may not enforce a collective bargaining agreement that is contrary to public policy". See *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & PLastic Workers of America,* 103 S.Ct. 2177, 2183 (1983). Under *45 U.S.C. Section 153,* an arbitration award may be vacated for failure "to conform, or confine itself, to matters within the scope of the division's jurisdiction."

In the instant case, the arbitration award is irrational since the Arbitrator ruled each of the complaint issues in favor of NEC despite the lack of merit in its testimony which was proven to be false in light of credible evidence. The arbitration award whereby Nghiem took nothing and NEC was held not liable for any of Nghiem's claims was "wholly baseless and completely without reason". See *Gunther v. San Diego & Arixona E. Ry.,* 86 S.Ct. 368, 370 (1965). "[N]o judge, or group of Judges could ever conceivably have made such a ruling" if they had a chance to examine the instant case. See *Safeway Stores v. American Bakery & Confectionery Workers Int'l. Union, Locall 111,* 390 F.2d 79, 82 (5th Cir.1968).

2. NEC's material fraud through perjury of its witnesses requires vacation of arbitration award pursuant to 9 U.S.C. Section 10(a).

Perjury constitutes fraud under *Fed.R.Civ.P. 60(b)(3).* And

certainly, there is no doubt that perjury constitutes fraud within the meaning of the FAA. See *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293 (1982). As held by the Court in *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 598 (3rd. Cir.), cert. denied, 89 S.Ct. 378 (1968), obtaining an award by perjured testimony constitutes fraud. In pertinent part, *Fed.R.Civ.P. 60(b)* provides as followed:

> "**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud,etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

NEC's witnesses had deliberately delivered false testimonies several times under oath at arbitration proceeding to obtain a ruling in their favor (See S.D.P.N., par. 8-15).[5] Therefore, the arbitration award should be vacated on the basis of fraud. See *Harre v. A.H. Robins*, 750 F.2d 1501, 1503 (11th Cir.1985) and *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir.1988).

3. NEC's conduct in raising facially meritless defenses in arbitration proceeding constituted procurement of arbitration award by undue means. 9 U.S.C. Section 10(a).

Judicial review is permitted when the arbitration award is

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5. Further discovery and trial by Jury is necessary for the Court to examine the *fraud* and *perjury* perpetrated by NEC in its attempt to disguise its antitrust violation and employment discrimination.

procured by undue means. In *Edwards & Sons, Inc. v. McCullough,* 764 F.Supp. 1365 (D.Ariz. 1991), the Court granted investors motion to vacate arbitration award holding that brokerage firm's conduct in raising multiple facially meritless defenses in arbitration proceeding constituted procurement of award by "undue means". In the instant case, NEC's meritless defenses based on unwarranted allegations and unfounded legal argument constituted procurement of arbitration award by undue means as shown below:

> 1) NEC asserted in its Closing Brief at arbitration that "Complainant [Nghiem] has shown neither outrageous conduct on the part of Respondent nor actual emotional distress on the part of Complainant" in spite of the substantial amount of evidence, to the contrary, supporting Nghiem's claim of mental anguish due to NEC's atrocious conduct (Exhibit A, p.45-47 of S.E.R.; Exhibit A, p.28-31 of Suppl. Excerpts of Record for Brief of Appellee-Respondent).
>
> 2) NEC cited cases which actually contradicted with its own assertion such as "See *Lanouette v. Ciba-Geigy Corp.,* 272 Cal.Rptr. 428 (Cal.App. 5 Dist. 1990) (long-term sales employee discharge for poor productivity was awarded damages for humiliation he claimed to have suffered), review granted, Dec 3, 1990; *Wallis v. Superior Court,* 207 Cal.Rptr. 123, 130 160 Cal.App. 3d 1109,1120 (1984) (claim was properly stated by allegations that defendant intentionally abused its superior economic position over

plaintiff without good reason and by lying about actual reasons)." (Exhibit B, p.49:16-24 of S.E.R.)

3) NEC claimed that "there is no evidence of conduct or words that might show prejudice, discrimination, animosity or dishonest motives on the part of Respondent. . ." (Exhibit B, p.49:2-4 of S.E.R.) while it blatantly used several unwarranted and defamatory allegations as termination reasons throughout the arbitration proceedings and in Nghiem's termination records issued by NEC (Exhibit A, p.1-31 of S.E.R.).

4) Regarding the antitrust violation issue, NEC asserted that "However, even taking all the alleged conduct by Respondent [NEC] as true, Complainant [Nghiem] has failed to show any injury to himself giving him standing to assert this claim. As a salaried employee of Respondent, Complainant had no independent economic interest in the success or failure of the COT business. [Citing] See, e.g., *Bhan v. NME Hospitals, Inc.*, et al, 929 F.2d 1404 (9th Cir.1991)." (Exhibit B, p.50:12-20 of S.E.R.). This assertion is invalid under *Section 4 of Clayton Act, Standing of the Terminated Employee,* while the *Bhan* case does not support NEC's argument.

Appendix E

4. The arbitration award should be vacated "as being in manifest disregard of the law" where the arbitrator knew the law and expressly disregarded it.

Several courts have mentioned the proposition that a "manifest disregard of the law" by the arbitrators may warrant vacating the award. See *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631 (10th Cir.1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930 (2d Cir.1986); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir.) cert, denied, 106 S.Ct. 2249 (1986). In a recent case, *Ainsworth v. Skurnick,* 909 F.2d 456 (11th Cir.1990), the Court held that the arbitrator's denial of damages on a statutory violation was a manifest disregard of the law, thus, the award should be vacated.

The obvious prejudicial misbehaviors of the Arbitrator in the incidents cited below establish a manifest disregard of the law:

1) The arbitrator's conclusions that NEC was not liable for any of Nghiem's claims plainly contradicted the evidence as well as the law, particularly under Title VII and antitrust laws.

2) The arbitration award was so irrational that judicial review is necessary to serve justice.

3) The arbitrator allowed NEC's witnesses to deliver perjured testimonies at arbitration proceeding (See S.D.P.N.,par.8-15).

4) The Arbitrator denied the incidents when NEC's Director of Human Resources made direct contact with the arbitrator in violation of Rule 45 of the American Arbitration Association Voluntary Labor Arbitration Rules (See S.D.P.N., par. 4-5).

5. The arbitrator was guilty of misconduct in refusing to consider critical evidence pertinent and material to the controversy. 9 U.S.C. Section 10(c).

The arbitrator must allow each party "adequate opportunity" to present evidence and arguments although he is not bound to consider all evidence tendered. In *Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901,* 763 F.2d 34, 40 (1st Cir.1985), the First circuit affirmed a district court's vacatur of an award where the arbitrator "effectively denied the Company an opportunity to present any evidence in the arbitration proceeding."

In the instant case, the Arbitrator rejected the additional Arbitration Exhibits, attached to the "Closing Brief of Peter Nghiem" (See S.D.P.N., par. 1-3). The refusal of the arbitrator to consider this critical evidence, pertinent and material to the controversy, deprived Nghiem of the opportunity to prove the true facts, thus, depriving him of a fair hearing.

6. Appellant's action which was construed as a motion to vacate the arbitration award, was timely commenced.

Since the FAA does not apply to the instant case, it is appropriate to borrow a limitation period from any federal statute. Essentially, in determining which statute of limitations can be borrowed for the instant case, there were three possibilities:

(1) The six-month limitation found in Section 10(b) of the National Labor Relations Act.

(2) The six-year provision for suits against the United States in 28 U.S.C. Section 2401.

(3) The three-month period of the FAA, 9 U.S.C. Section 12.

Using any one of the federal statutes listed above, Nghiem's motion to vacate the arbitration award was timely commenced. After the arbitration award was rendered on November 18, 1991, Nghiem raised the issue by writing to American Arbitration Association on November 27, 1991 to request a trial de novo and confirm his non-binding arbitration position (Exhibit M, p.34 of E.R.), and by filing the "First Amended Complaint" in Santa Clara County Superior Court on February 5, 1992 (Exhibit S, p.63 of E.R.). Nghiem's actions are construed as the commencement of a motion to vacate the award as held by the Court in *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1382 (11th Cir.1988), stating that "although technically called a 'motion', the papers filed by a party seeking to confirm or vacate an arbitration award function as the initial pleadings in post-arbitration proceedings in the district court." Consistent with the holding in *DelCostello v. International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983), and *American Postal Workers Union, AFL-CIO, v. United States Postal Service,* 823 F.2d 466 (11th Cir.1987), the Supreme Court in *West v. Conrail,* 107 S.Ct. 1538, 95 L.Ed.2d 32 (1987) unanimously held that:

> "When the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary for a federal court to borrow a limitations period from another statute, the *action is not barred if it has been "commenced" within the borrowed time period* by the filing of a complaint with the court in compliance with Rule 3 of the Federal

Appendix E

Rules of Civil Procedure. [See C. Wright & A. Miller, Federal Practice and Procedure Section 1056 (1969)]." Id., at 1539.

Moreover, under *Rule 15* of *Federal Rules of Civil Procedure,* an amended motion to vacate an arbitration award, filed outside of the three-month period and raising additional grounds for vacation, would be deemed timely where original motion to vacate was timely. Therefore, Nghiem respectfully requests that the Court of Appeals remands the case back to the District Court for an amended motion to vacate the arbitration award based on the vacaturs cited in this Reply Brief.

E. THE CONFIRMATION OF THE IRRATIONAL ARBITRATION AWARD AND DISMISSAL OF APPELLANT'S ACTION MANIFEST INJUSTICE AND DEPRIVE APPELLANT OF HIS DUE PROCESS.

The doctrines of res judicata and collateral estoppel do not apply to the matter presented to this Court because the arbitration award is irrational and procured by fraud, undue means, manifest disregard of law, and evident partiality and misconduct of the Arbitrator. Moreover, Nghiem could not have known of Appellees's practice of intentional employment discrimination against him with "mixed motives" to claim his work credit as their own and use him as a "scapegoat" in its conspiracy to illegally restrain trade. Nghiem could not have realized that he was retaliated and unjustly discharged for whistleblowing NEC's conspiracy to obstruct the development of COT (ASIC foundry) business in the U.S. and the serious management problems in NEC's ASIC group (Exhibit A, p.16-18, 35-46 of Supplemental

Excerpts of Record for Brief of Appellee-Respondent). These issues in "Race Discrimination" and "Unfair Trade Practice" together with the causes of action of "Negligent Infliction of Emotional Distress", "Fraudulent Misrepresentation", "Unjust Enrichment" and "Conspiracy" were not presented at arbitration. Furthermore, Nghiem's antitrust claim against NEC was not decided by the Arbitrator.

The Court in *Kriegler v. Eichler Homes, Inc.*, 269 Cal.App.2d 224, 74 Cal.Rptr. 749 (1969) and *Eichler Homes, Inc. v. Anderson*, 9 Cal.App.3d 224, 87 Cal.Rptr. 893 (1970) held that collateral estoppel did not apply because the issue was not presented or decided in the first lawsuit. In *Neil Norman, Ltd. v. Williams Kasper & Co.*, 149 Cal.App.3d 942, 197 Cal.Rptr. 198 (1983), the Court held that the first lawsuit did not preclude the second under principles of res judicata because Norman could not have known of defects in the acrylic sweaters when he filed the first suit and because he still did not know of such defects when he dismissed the first suit with prejudice.

In the instant case, the requirements for application of res judicata are not met because the irrational arbitration award is by no mean "valid" and "conclusive on matters of fact and law" to be "thereafter res judicata" as stated in *Arbitration and Award*, 6 Cal.Jur.3d Section 41, p.72. The lack of credible evidence to justify the unfair and erroneous arbitration award precludes res judicata. In addition, even taking an offensive use of the doctrine of collateral estoppel by assuming the issues not presented at arbitration are derivative claims, the requirements for its application to the instant case are still not met. Nghiem did not have a full and fair opportunity to litigate these issues because of the irregularities at the arbitration proceeding cited as vacaturs in this Reply Brief.

Furthermore, the requirements for application of res judicata based on "the same parties on the same cause of action" stated in *Murphy v. Gallagher,* 761 F.2d 878, 879 (2d Cir.1985)) are not met in the instant case. In *Dalow Inductries, Inc. v. Jordache Enterprises, Inc.*, 631 F.Supp. 779 (S.D.N.Y. 1986), the Court held that res judicata did not apply because Rolo and Glenn, not being parties to the Dalow-Jordache contract, did not participate in the arbitration although their representatives were made available as witnesses to both sides. Similarly, in the instant case, NEC Corporation (Tokyo), one of the Defendants in this lawsuit, is not a party to the employment contract between Nghiem and NEC Electronics Inc.. NEC Corporation (Tokyo) did not participate in the arbitration although two of the witnesses, Mr. H. Hashimoto and Dr. H. Yoshizawa, were also its representatives.

In *Standefer v. United States,* 100 S.Ct. 1999, 2008 (1980) the Supreme Court noted that " 'competing policy considerations' [may] outweigh the economy concerns that undergird the estoppel doctrine." Also see *Montana v. United States,* 99 S.Ct. 970, 978 (1979). The Supreme Court later in *McDonald v. City of West Branch,* 104 S.Ct. 1799 (1984) held that "[c]ollateral estoppel is not to be applied mechanically. . . . [and] countervailing policies may justify a refusal to apply principles of estoppel". The Court ruled that a federal court should not afford res judicata or collateral estoppel effect to an arbitration award in a subsequent Section 1983 action. Id., at 1804. The Supreme Court noted that earlier cases reaching the same result in actions under other statutes (*Alexander v. Gardner-Denver Co.,* 415 U.S.34, 94 S.Ct. 1011 (1974) (Title VII) and *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 101 S.Ct. 1437 (1981) (Fair Labor Standards Act)) "were based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate

substitute for judicial proceedings in adjudicating under those statutes." Id., at 1802-1803. This non-preclusive effect applied to arbitration awards in Section 1983 suits are also relevant in the antitrust context. Id.

In *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983), the Ninth Circuit held that the initial burden of showing the absence of a material factual issue is on the moving party. Once that burden is met, the opposing party must come forward with specific facts, and not allegations, to show that a genuine factual issue remains for trial. Id. While NEC could not show the absence of a material factual issue in the light of substantial amount of credible evidence supporting Nghiem's claims, Nghiem has met his burden of proof (See S.D.P.N., D.P.N., E.R. and S.E.R.). NEC chose not to recognize the presence of specific material facts that Nghiem had presented to the Court and cited authorities that are not applicable to the instant case. As a *complex case involving public policy violation* under Title VII and antitrust laws, this case requires a full and thorough examination of the record, better yet by a jury, to determine the motive and intent of the perpetrator (Exhibit A, p.1-49 of Supplemental Excerpts of Record for Brief of Appellee-Respondent; Exhibit A, p.1-48 of S.E.R.).

Confirming the irrational arbitration award and dismissing Nghiem's claims for any of NEC's alternative grounds including summary judgment and/or summary adjudication will **manifest injustice and deprive Nghiem of his due process**. The arbitration proceeding tainted with irregularities which resulted in an arbitrary and capricious award, did not comply with due process standards of fairness and justice. Consequently, Nghiem's causes of action are not barred by the doctrine of res judicata and collateral estoppel. He is entitled to be heard by a jury for all of his claims, particularly his causes of action under Title VII and antitrust laws.

Appendix E

IV. CONCLUSION

The instant case should not be decided under the Federal Arbitration Act because a valid executed contract for binding arbitration does not exist and Appellant-Plaintiff Peter P. Nghiem belongs to a class of workers "engaged in foreign and interstate commerce" with a "Contract of Employment" within the meaning of the exclusion in 9 U.S.C. Section 1. The District Court does not have jurisdiction to confirm the arbitration award and dismiss the case when Appellant's "Contract of Employment" with Appellee-Respondent NEC does not contain an arbitration provision and his wrongful termination was in violation of established public policy under Title VII and antitrust laws.

Affirming the judgment based on any of Appellee's grounds would manifest injustice and abuse of discretion because the arbitration award is arbitrary and capricious. Moreover, Appellant is entitled to vacation of the award on the basis of fraud, undue means, manifest disregard of the law, and evident partiality and misconduct of the Arbitrator. This Court should deny Appellee's frivolous and meritless defense relying on inappropriate argument which has no basis in facts. An adverse arbitration decision contrary to American public policy does not foreclose Appellant's right to pursue judicial remedies for his claims under Title VII amended by the Civil Rights Act of 1991, and Sherman Anti-Trust Act and Clayton Act. Appellant respectfully requests that this Court REVERSE the judgment of the District Court and REMAND the matter for **an amended motion to vacate the award and a trial by jury.**

DATE: December 25, 1992

Appendix E

Respectfully submitted,
Law Office of DAVID H. TOLLNER
By: s/ David H. Tollner
DAVID H. TOLLNER
Attorney for Appellant-Plaintiff

I declare under penalty of perjury that the facts set forth in this Brief is true and correct of my own knowledge.

DATE: December 25, 1992

Respectfully submitted,
By: s/ Peter Nghiem
PETER NGHIEM
Appellant-Plaintiff

APPENDIX F — DECLARATION OF PETER NGHIEM IN SUPPORT OF APPELLANT-PLAINTIFF'S BRIEF SUBMITTED ON OCTOBER 14, 1992

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PETER NGHIEM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals
Docket Number:
92-16155

Lower Court Docket Number:
CV-92-20135 RMW (EAI)

IN THE MATTER OF:

PETER P. NGHIEM,

Appellant-Plaintiff,

v.

NEC ELECTRONICS, INC., a California corporation, NEC CORPORATION (TOKYO), Japan (Nippon Electric Company), a

Appendix F

Japanese corporation, HIRO HASHIMOTO, DR. H. YOSHIZAWA, GRANT HULSE and DOES 1-100 inclusive,

Appellees-Respondents

Declaration of Peter Nghiem
In Support of Appellant-Plaintiff's Brief

TO THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

DECLARATION OF PETER NGHIEM

Peter Nghiem, having been duly sworn, deposes and states as follows:

1) I am Appellant in the above-entitled matter, This is a lawsuit for damages against employer NEC Electronics Inc., NEC Corporation Corporation (Tokyo) Japan and coemployees, hereinafter "NEC" or "Respondent(s)", alleging, inter alia, wrongful termination, intentional infliction of emotional distress, fraudulent misrepresentation, libel and slander, conspiracy, race discrimination and unfair trade practice.

2) I began my employment with NEC on August 31, 1989 as a Senior Product Marketing Engineer operating in the capacity of a "COT/CAD Product Manager" of the ASIC Strategic Marketing department as my functional and business title.

3) On the first day of employment, I signed a contract of employment entitled "Employment, Invention and Confidential Information Agreement" (Exhibit E, p. 17-19 of Excerpts of

Record). That agreement does not contain a provision or reference of any sort to the use of binding arbitration to resolve disputes.

4) Paragraph 11 of the contract of employment provides that "the Company and I may subsequently amend this agreement by written instruments that specifically refer to this agreement and that are executed in the same manner as this agreement". At no time did I sign a subsequent document to amend or modify the original contract of employment to agree to binding arbitration.

5) On or about January or February of 1990, a separate and distinct contract of employment was presented to me for my signature. Said contract is entitled "Employment, Invention, Authorship, Proprietary and Confidential Information, and Arbitration Agreement", 1987 version (Exhibit F, p. 20-23 of Excerpts of Record). I refused to sign that document because it contained the unambiguous employment-at-will language and the binding arbitration provision.

6) Following my termination on June 11, 1990, I was repeatedly told by NEC that the only manner in which I could resolve my complaint against NEC, was by following the four step problem resolution process contained within the policy manual (Exhibit I, p. 27 of Excerpts of Record). I was not given the option of alternative resolution process, which was my right in consideration of the fact that I never signed a contract of employment that included binding arbitration provision. I was led to believe, by the wording of the policy and by the representations of NEC, that my only option was to follow the four step process. I always believed that once that process was over, I could still bring the case before a jury if necessary.

7) NEC's policy on problem resolution process, with its

language stating that "It is the *only* process by which an employee or terminated employee may pursue a Complaint" and "If you desire to pursue the Complaint further, the Complaint *must* be submitted to an impartial arbitrator or it is waived" (Exhibit I, p. 27 of Excerpts of Record), led me to believe that the only way for me to resolve my complaint is to avail myself of arbitration. I believe my right to have a choice to take action in court instead of private arbitration is fraudulently denied, particularly for my statutory claims of employment discrimination and antitrust violation. NEC's problem resolution process also denied me a fair grievance process by requiring me, a terminated employee, to advance my own attorney's fee to effectively eliminate the possibility (Exhibit L, p. 31-33 of Excerpts of Record).

8) I did not at any time agree or intend, orally or in writing, to subject my claims to binding arbitration. It was my sincere belief that the arbitration which took place was non-binding on me because I had refused to sign the second contract of employment containing binding arbitration provision. (Exhibit F, p. 20-23 of Excerpts of Record).

9) Taking advantage of the limited fact finding process and the lack of usual rule of evidence at arbitration, Respondents deliberately delivered false testimonies to support their unwarranted allegations, based on hearsay, about my character and conducts as reasons for discharge to obtain arbitration ruling in NEC's favor.

10) Although Respondents' allegations were impeached numerous times at arbitration hearings, the arbitrator did not take any action to warn Respondents of their misconducts. A typical incident was presented in Appellant's Arbitration Closing Brief where Respondent Mr. Grant Hulse changed and recanted his

testimony (Exhibit Q, p. 60-61 of Excerpts of Record =>Appellant's Arbitration Closing Brief 21-22). Another typical example where Respondent Mr. Hiro Hashimoto, through carefully prepared testimony, pretended not to remember and recall the important incidents to deny the critical facts (Exhibit P, p. 57-59 of Excerpts of Record =>AAA Hearing Transcript 856:15-25; 857:1-25; 858:1-23).

11) The recording of my testimony at the arbitration hearing on April 3, 1991 was apparently altered to make it so unintelligible that the facts are either distorted or misunderstood (Arbitration Hearing Transcript 597-665). The english grammar structure in the recording of my testimony on April 3, 1991 was made so broken with expressions hardly used by me that it sounds like I have linguistic communication problem. I had to edit the transcript to correct the misrecordings and clarify the facts.

12) NEC conspired to deter the truthful testimonies of certain witnesses at-arbitration and influence the impartiality of the arbitrator through persistent direct contact in violation of AAA rules (Exhibit L, p. 31-33 of Excerpts of Record). NEC's Arbitration Closing Brief contained several allegations and facts which had been proven to be incorrect and unwarranted at arbitration in the light of substantial amount of evidence including witnesses' testimonies and exhibits (Exhibits C and D, p. 9-16 of Excerpts of Record).

13) I believe that my civil rights under 42 U.S.C. Section 1985(2) have been violated by NEC who conspired to obstruct and defeat the due course of justice to continue the disguise of its unlawful activities in employment discrimination and illegal restraint of trade.

Appendix F

14) The List of Chronological Events (Exhibit C, p. 9-14 of Excerpts of Record) and the NECEL ASIC Organization Chart presented at arbitration as exhibit 65B were lost when they were in the arbitrator's custody. I had to recreate them and resubmitted them with Plaintiff's Arbitration Closing Brief at the end of arbitration.

15) The arbitrator was uncertain whether I had standing to claim damages under antitrust laws. At the beginning of arbitration, Mr. John Kagel questioned that ". . . whether you (Nghiem) can even have a standing on the part of an individual to claim that there was an antitrust violation that would run to that individual. I just don't know." (Exhibit P, p. 50-51 of Excerpts of Record =>AAA Hearing Transcript 12:24-25;13:1-2).

16) The arbitrator did not understand the nature of the illegal restraint of trade practiced by NEC in 1989 and 1990. Mr. Kagel did not recognize the fact that I, in concurrence with NEC's intentional employment discrimination, was discharged for my refusal to participate in NEC's unfair trade practice (Plaintiff's First Amended Complaint, p. 42-47) and my "whistleblowing" to Mr. Denny Mitchell, Director of Human Resource department about NEC's unlawful activities (Exhibit N, p. 35-40 of Excerpts of Record). In the third hearing, the arbitrator commented that "I don't know what you think the law is with respect to antitrust. I will allow you to submit that to me, . . . so I can look it up. . . . Because I do not know of an active claim by an employee who is given a work assignment . . . and then in some view believes that that work assignment was sabotaged by somebody for lack of support, either intentionally or negligently, to lead to antitrust violation, at least where there is no profit sharing arrangement involved." (Exhibit P, p. 52 of Excerpts of record =>AAA Hearing Transcript 499:2-16).

Appendix F

17) The fact that I availed myself of arbitration without knowing that antitrust claim is unenforceable under a private arbitration agreement, does not affect my rights to statutory remedies. The language in the arbitration clause in NEC's company handbook does not encompass a claim that employer entered into a conspiracy in violation of the antitrust laws. Besides, I did neither intend nor agree to be abided by NEC's binding arbitration provision which is not included in my "Contract of Employment".

18) The issue of employment discrimination was not fully examined by the arbitrator. I, myself, used the arbitration hearings as a fact finding process to establish my causes of action in court. Realizing that NEC was not resolving the dispute in good faith, and continue to disguise its employment discrimination practices against me and its hidden agenda in illegal restraint of trade , I timely initiated a complaint of race discrimination against NEC in California Department of Fair Employment and Housing (DFEH) on June 3, 1991 (Exhibit J, p. 28 of Excerpts of Record). A few days later, I filed a lawsuit in Santa Clara County Superior Court on June 10, 1991 (Exhibit R, p. 62 of Excerpts of Record) which is shortly after the fourth arbitration hearing. Subsequently, I obtained the Right-To-Sue letter from California DFEH on June 15, 1991 (Exhibit K, p. 29-30 of Excerpts of Record).

19) By participating in an arbitration without signing any agreement for binding arbitration under the Federal Arbitration Act, I did not intend to waive my causes of action under Title VII and antitrust laws in federal court.

20) NEC's failure to treat me with fairness and equity, and its refusal to promote me to a management position as promised despite my solid qualification while intentionally harassing and

humiliating me in private and in public, because of my race and national origin establish prima facie case of race discrimination (Plaintiff's First Amended Complaint 35-39) where evidence overwhelmingly indicated that I was efficient in required area of work accomplishments, organizational skills, interpersonal relationship skills, project management and communication skills (Exhibit O, p. 41-49 of Excerpts of record). NEC's continuing intentional discrimination which subjects me to severe mental anguish and emotional distress in violation of established public policy under Title VII entitles me to a trial by a jury of my peers.

21) The arbitrator rejected the additional exhibits attached to Plaintiff's Closing Brief including expert's analysis of damages (Exhibit L, p. 31-33 of Excerpts of Record). Not all causes of action cited in my original Complaint and First Amended Complaint were addressed by the arbitrator such as conspiracy, negligent infliction of emotional distress, unjust enrichment and unfair trade practice. In addition, the arbitrator did not include any conclusions of law in its award in favor of NEC while the findings of fact is incomplete.

22) NEC attempted to conceal evidence by failing to attach the complete set of Appellant's First Amended Complaint package to NEC's Notice of Removal of Action when NEC removed the case to federal court on March 6, 1992. The First Amended Complaint package contains a pleading of fourty-nine pages long together with the fifty-pages Arbitration Closing Brief, the Index of Exhibits (Exhibit C, p. 9-14 of Excerpts of Record), the List of Chronological Events (Exhibit D, p. 15-16 of Excerpts of Record) and the formal complaint to California DFEH (Exhibit J, p. 28 of Excerpts of Record). Only the fourty-nine pages pleading of the First Amended Complaint was attached to NEC's Notice of Removal of Action.

Appendix F

23) Judge Whyte's ruling on June 9, 1992 in favor of NEC (Exhibit A, p. 1-6 of Excerpts of Record) is derived from insufficient and erroneous facts, and the misinterpretation of my intent. I did neither intend nor agree to subject my claims to binding arbitration in my letter to Mr. Denny Mitchell requesting to proceed with Step-four of NEC's problem resolution process. That letter is not a contract of binding arbitration amending my "Contract of Employment". The Court erred in stating that I "sits idle while arbitration decision is rendered" and did not initiate the complaint in Santa Clara County Superior Court until February of 1992. In fact, I did initiate the lawsuit against NEC in Santa Clara County Superior Court on June 10, 1991 (Exhibit R, p. 62 of Excerpts of Record), five months before the end of arbitration. Furthermore, I did confirm my disagreement with the arbitrator's ruling and my non-binding arbitration position in writing when I asked AAA for a trial de novo on November 27, 1991 (Exhibit M, p. 34 of Excerpts of Record).

24) The district court did not address the merits of the case in the judgment issued on June 9, 1992, particularly the issues on race discrimination and antitrust violation where public policy was violated.

25) My actions in requesting AAA for a trial de novo on November 27, 1991 (Exhibit M, p. 34 of Excerpts of Record) and submitting the First Amended Complaint to Santa Clara County Superior Court on February 5, 1992 (Exhibit S, p. 63 of Excerpts of Record) are construed as a motion to vacate the arbitration award.

26) Because of the fraud, undue means and "manifest disregard of the law" occurred at arbitration, the arbitration award was rendered erroneously in favor of NEC. I respectfully contend that the district court's confirmation of the arbitration award and

dismissal of my complaint in its entirety resulted in manifest injustice. Should the Court of Appeals decided that the Federal Arbitration Act applies despite the absence of a specific, valid and executed contract for binding arbitration, I respectfully prays the Court to remand the district court's decree with orders to vacate the arbitration award.

I declare under penalty of perjury that the facts set forth in this Statement of Declaration is true and correct of my own knowledge and that the exhibits attached to Appellant-Plaintiff's Brief are true and accurate copies of the documents I have stated them to be.

DATED: October 14 , 1992, Executed at San Jose, California.

BY: s/ Peter Nghiem
PETER NGHIEM
Appellant-Plaintiff

APPENDIX G — SUPPLEMENTAL DECLARATION OF PETER NGHIEM IN SUPPORT OF APPELLANT-PLAINTIFF'S REPLY BRIEF SUBMITTED ON DECEMBER 14, 1992

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. Court of Appeals
Docket Number:

92-16155

Lower Court Docket Number:

CV-92-20135 RMW (EAI)

IN THE MATTER OF:

PETER P. NGHIEM,

Appellant-Plaintiff

Appendix G

v.

NEC ELECTRONICS, INC., a California corporation, NEC CORPORATION (TOKYO), Japan (Nippon Electric Company), a Japanese corporation, HIRO HASHIMOTO, DR. H. YOSHIZAWA, GRANT HULSE and DOES 1-100 inclusive,

Appellee-Respondents.

Supplemental Declaration of Peter Nghiem
In Support of Appellant-Plaintiff's Reply Brief

TO THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

SUPPLEMENTAL DECLARATION OF PETER NGHIEM

Peter Nghiem, having been duly sworn, deposes and states as follows:

1. FACTS RELEVANT TO IRRATIONAL ARBITRATION AWARD:

All the facts stated in the the "Declaration of Peter Nghiem In Support of Appellant-Plaintiff's Brief", inclusive, are incorporated by reference.

1) The arbitrator, Mr. John Kagel, in his letter dated October 14, 1991 to Mr. David Weinberg, Director of Labor Services of American Arbitration Association (AAA) (Exhibit E , p. 63-64 of Supplemental Excerpts of Record), refused to consider and rejected the additional Arbitration Exhibits attached to the

Appendix G

"Closing Brief of Peter Nghiem" which are listed below:

(AAA Exhibit #)

"C" Article from September, 1988 Business Week entitled "A Matter of Control".

"D" Senator Tom Lantos Hearing on Employment Discrimination by Japanese Owned Companies in the United States.

"E" Expert Arthur Clark's Curriculum Vitae.

"F" Expert Arthur Clark's Compensatory Damage Calculations for Wage Loss/Breach of Contract.

"G" Nghiem's canceled bonus check from NEC for calendar year 1990.

"H" Nghiem's Curriculum Vitae.

"I" Department of Fair Employment and Housing (DFEH) Complaint filed by Nghiem.

"J" Dave Nieto's Investigation Notes.

(Exhibit C, p. 14 of Excerpts of Record)

2) The Arbitrator refused to admit into evidence the investigation notes of Dave Nieto, Manager of Corporate

Appendix G

Compensation Benefits and Information Systems for NEC Electronics (Exhibit D, p. 58-62 of Supplemental Excerpts of Record), that Nghiem requested in the hearings. This crucial document was necessary to determine whether NEC's Human Resource department had thoroughly and properly verified the facts before discharging Nghiem.

3) Dave Nieto's Investigation Notes (Exhibit D, p. 58-62 of Supplemental Excerpts of Record) showed a sloppy and improper review done by NEC's Human Resource department who relied on the unwarranted allegations of Mr. G. Hulse and Mr. H. Hashimoto, and hearsay evidence to unjustly discharge Nghiem (See Exhibit A, p. 1-48 of Supplemental Excerpts of Record).

4) Despite Rule 45 of American Arbitration Association Voluntary Labor Arbitration Rules which prohibited direct communication with the arbitrator, NEC persisted in making direct contacts with the Arbitrator whenever it felt that it would work toward its advantage, as accounted for, in at least three occasions (Exhibit L, p. 31 of Excerpts of Record; Exhibit F, p. 65-73 of Supplemental Excerpts of Record).

5) The Arbitrator, in his letter to Mr. Weinberg dated October 14, 1991 (Exhibit E, p. 63-64 of Supplemental Excerpts of Record), denied the fact that Mr. Denny Mitchell, Director of Human Resource of NEC Electronics Inc., had violated AAA rules in making direct contacts with the arbitrator.

6) Nghiem was asked to pick an arbitrator from the three candidates that NEC had preselected and prequalified. The Arbitrator was solely compensated by NEC.

7) The arguments of the parties at arbitration surrounded the

incidents engineered by NEC as pretextual causes for termination. (See Exhibit A, p. 1-48 of Supplemental Excerpts of Record). The arbitration proceedings indicated that the Arbitrator focused only on the contractual issues of Nghiem's discharge while his statutory claims under Title VII and antitrust laws were not properly examined.

8) The AAA "Closing Brief of Peter Nghiem" (Exhibit A, p. 1-48 of Supplemental Excerpts of Record) was prepared by Mr. Robert Kahn, Nghiem's counsel at the end of arbitration, after he had fully examined the arbitration proceedings and exhibits. The "Background and Pertinent Facts" in the closing brief (Exhibit A, p. 6-31 of Supplemental Excerpts of Record) which presents the true facts derived from ample and credible evidence, proves that NEC's allegations are unwarranted.

9) As presented in the "Declaration of Peter Nghiem In Support of Appellant-Plaintiff's Brief" on fact number 10, p. 4:17-28, Mr. G. Hulse, Product Marketing Manager, and Mr. H. Hashimoto, ASIC General Manager, committed perjury when they delivered false testimonies under oath at arbitration proceeding. These obvious incidents were cited in the "Declaration of Peter Nghiem" as typical examples of numerous other incidents of perjury since their versions of the facts were far from correct (Exhibits P and Q, p. 57-61 of Excerpts of Record; Exhibit A, p. 24-27 of Supplemental Excerpts of Record).

10) Mr. H. Hashimoto denied the fact that he had directly assigned the contract negotiation and discussion of the technology partnership with Cadence to Nghiem although he personally introduced Nghiem at that capacity to Cadence management, Mr. Larry Fagg, Account Manager, and Dr. Lawrence Rosenberg, Director of Advanced EDA Development (Exhibit P, p. 57-59 of

Excerpts of Record; Exhibit C, p. 56 of Supplemental Excerpts of Record). For the preparation of contract negotiation strategy (Exhibit H, p. 76-77 of Supplemental Excerpts of Record), Nghiem received the projected number of CAD design systems using Cadence tools (Code name ACE) for NEC corporate in Japan over a period of four years based on the yen/dollar exchange rate directly from Dr. Hiroshi Kawanishi who managed this project in Japan for NEC Tokyo (See Exhibit I, p. 78 of Supplemental Excerpts of Record). Due to the complexity of a corporate-wide contract and his heavy workload, Nghiem, subsequently, requested the support of Mr. Ernie Frolichman, Staff Contract Administrator, who worked closely with Nghiem and Cadence over a period of around four to five months to finalize the terms and conditions of the multi-year multi-million dollars technology partnership and corporate-wide purchase agreement (See Exhibit C, p. 55-57 of Supplemental Excerpts of Record).

11) Mr. H. Hashimoto refused to testify truthfully by pretending not to remember and recall any critical facts (Exhibit A, p. 30 (25:9-11), Exhibit C, p. 53 of Supplemental Excerpts of Record; Exhibit P, p. 57-59 of Excerpts of Record). His denial of any direct assignments to Nghiem is inconsistent with the evidence where Mr. H. Hashimoto often gave Nghiem his direction on the COT and CAD issues (Exhibit C, p. 12 of Excerpts of Record (AAA Exhibits 61 and 64-67)). Although he was not Nghiem's direct supervisor, he did assign work directly to Nghiem from the project management stand point. And of course, Mr. G. Hulse never objected this management style since that would free him to complete his own "Standard Cell Catch-Up" project. Both Nghiem and Mr. G. Hulse had separate and, somewhat, independent work projects assigned by Mr. Hashimoto who later did not acknowledge his own department direction at arbitration while trying to take Nghiem's work accomplishments in the COT

and CAD area and give them to Mr. Hulse (Exhibit C, p. 51-52 of Supplemental Excerpts of Record; Exhibit O, p. 41-49, Exhibit N, p. 35-38 of Excerpts of Record; Exhibit A, p. 6 of Supplemental Excerpts of Record for Brief of Appellee-Respondent).

12) The alleged misconducts and incidents which were used as causes for Nghiem's termination, are falsely testified by Mr. G. Hulse as shown in the "Closing Brief of Peter Nghiem" prepared by Mr. Robert Kahn. Mr. Hulse falsely denied the occurrence, informality and flexibility of the weekly meetings with Nghiem despite the supporting evidence in Nghiem's notebook and did not produce his log book as requested (Exhibit A, p. 24-25 of Supplemental Excerpts of Record). Mr. Hulse's allegations have severe weaknesses from the start. And gradually, these weaknesses reached the point of unreasonableness (Exhibit A, p. 24-31 of Supplemental Excerpts of Record; Exhibit N, p. 35-39 of Excerpts of Record).

13) The Arbitrator clearly displayed his partiality during arbitration proceeding by helping NEC's witnesses with their own testimonies and leading them to testify the way he expected. As a typical example, during the cross-examination of Mr. H. Hashimoto who denied Nghiem's accomplishment in coordinating a successful CICC (Custom Integrated Circuits Conference) trade show for NEC in Boston (Exhibit G, p. 74-75 of Supplemental Excerpts of Record), the Arbitrator elaborated the witness's answer and led Mr. H. Hashimoto and Mr. G. Hulse to agree to his own preconceived version of the facts. Mr. G. Hulse knew quite well that it was wrong, but he still went along with it to accept the work credit for his own benefit (Exhibit C, p. 51-52 of Supplemental Excerpts of Record; Exhibit G, p. 74-75 of Supplemental Excerpts of Record). This biased cross-examination approach was conducted by the Arbitrator throughout the arbitration proceeding.

Appendix G

14) At several instances in arbitration proceeding, instead of being frustrated at Mr. H. Hashimoto who was trying to hide the truth by pretending not being able to remember any critical facts while Nghiem was properly cross-examining the witness, the Arbitrator ridiculed Nghiem's questions or redirected the questions in favor of NEC's witness (Exhibit C, p. 53-54 of Supplemental Excerpts of Record).

15) The Arbitrator took no action to warn Mr. G. Hulse and Mr. H. Hashimoto of their perjury conducts and ironically adopted their false testimonies as the truth in the award. The unfair and erroneous award whereby Nghiem took nothing and NEC was held not liable for any of Nghiem's claims, was not supported by the substantial amount of credible evidence.

2. FACTS RELEVANT TO STATUTORY CLAIMS:

All the facts stated in the "Brief of Appellant-Plaintiff", the "First Amended Complaint For Damages" (Exhibit A, p. 1-49 of Supplemental Excerpts of Record for Brief of Appellee-Respondent) and the "Closing Brief of Peter Nghiem" (Exhibit A, p. 1-48 of Supplemental Excerpts of Record), inclusive, are incorporated by reference.

16) Nghiem was assigned to generate COT pricing matrices for the ASIC foundry business, but he was not able to gather all necessary yield and cost information from Mr. Tadahiro Hashimoto, Manager of Planning Department, and his staffs who resided in NEC's domestic manufacturing facility in Roseville, California. With the information on actual wafer process cost, packaging cost, assembly and test cost, and various yield rates at different manufacturing stages, Nghiem would be able to generate pricing matrices by die size and package size (See Exhibits J and K,

p. 79-82 of Supplemental Excerpts of Record). When Nghiem attempted to obtain the process yield, assembly and test yield, and manufacturing capability information from Mr. Hideto Goto, Assistant Department Manager of Production Engineering, in Roseville to generate COT pricing and marketing materials, Mr. H. Goto displayed an irrational agitated behavior to postpone the discussion of the issues (Exhibit A, p. 19 of Supplemental Excerpts of Record).

17) The pricing information generated from Roseville facility would reveal the hidden marked up profit margin of NEC Tokyo which was included in the transfer prices of the products shipped from NEC's facilities in Japan to NEC Electronics, Inc. in the U.S.. Therefore, Mr. T. Hashimoto insisted that he would generate the pricing matrices himself after he and his staffs exhibited a reluctance to disclose the requested cost and yield information (Exhibit A, p. 9 of Supplemental Excerpts of Record for Brief of Appellee-Respondent). The revealed breakdown cost information of the transfer prices of products shipped from Japan to the U.S. could affect the accounting records of NEC. Moreover, NEC Tokyo would have had difficulty in fixing price and restraining trade to manipulate market to the detriment of U.S. customers, particularly Chips & Technologies Inc.. (Recently, after the IRS announced that foreign companies in the U.S. owe approximately $35 billion in uncollected taxes, the Japanese firms have agreed to follow Matsushita to settle a formula with the IRS to pay taxes).

18) The COT Strategic Marketing Plan developed by Nghiem for the Product Planning Meeting in Japan in the week of November 13, 1989 together with the implementation strategies that he presented at the National Sales Conference in the week of February 4, 1990 were overshadowed by Mr. Hashimoto's empty

promises of adequate engineering resource and management support for the COT program (Exhibit A, p. 9-11 of Supplemental Excerpts of Record; Exhibit A, p. 8-10 of Supplemental Excerpts of Record for Brief of Appellee-Respondent). In addition, NEC Tokyo obstructed the transfer of technical information required for the ASIC foundry (COT) design activity and business development in the U.S., as verified by Dr. Hitoshi Yoshizawa (Exhibit P, p. 53-56 of Excerpts of Record), to restrict production at the domestic manufacturing facility in Roseville and control prices (Exhibit A, p. 42-46 of Supplemental Excerpts of Record for Brief of Appellee-Respondent).

19) Several issues under the causes of action of "Race Discrimination" and "Unfair Trade Practice" were not presented to the Arbitrator because they were not known by Nghiem when he filed the complaint at arbitration (Exhibit A, p. 16-18 35-46 of Supplemental Excerpts of Record for Brief of Appellee-Respondent). The Arbitrator did not rule on Nghiem's claim of antitrust violation against NEC because he incorrectly assumed that Nghiem dropped that claim.

20) The facts mentioned in this Supplemental Declaration can be further elaborated through court order for more discovery of the **fraud** and **perjury** perpetrated by NEC.

I declare under penalty of perjury that the facts set forth in this Statement of Declaration is true and correct of my own knowledge and that the exhibits attached to Appellant-Plaintiff's Brief are true and accurate copies of the documents I have stated them to be.

DATED: December 14, 1992, Executed at San Jose, California.

BY: s/ Peter Nghiem
PETER NGHIEM
Appellant-Plaintiff

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-677

(2)

In The

Supreme Court of the United States

October Term, 1994

PETER P. NGHIEM,

Petitioner,

v.

NEC ELECTRONICS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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114pp

QUESTION PRESENTED

The sole question presented is whether the United States Court of Appeals for the Ninth Circuit properly affirmed the Order of the United States District Court, Northern District, California, granting Respondent NEC Electronics, Inc.'s motion for confirmation of the arbitration award and dismissal of Petitioner Peter P. Nghiem's action, where the Ninth Circuit affirmed the district court's factual finding that said Petitioner voluntarily initiated, in writing, final and binding arbitration.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to the Rules of the Supreme Court of the United States, Rule 29.1, Respondent NEC Electronics, Inc. states as follows:

Parent: NEC Corporation
7-1 Sheiba 5-Chome Minato-Ko
Tokyo, 108-01
Japan

Affiliates: NEC Industries, Inc.
NEC Research Institute, Inc.
NEC America, Inc.
NEC Technologies, Inc.
NEC Systems Laboratories, Inc.
NEC Business Communications Systems, Inc.
MNI Corporation
HNSX Super Computers, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARENT COMPANIES AND SUBSIDIARIES	ii
TABLE OF AUTHORITIES	v
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	6
I. The Petition Fails To Present Grounds For The Issuance Of An Extraordinary Writ Authorized By 28 U.S.C. Section 1651(a) Under Supreme Court Rule 20	6
II. The Petition Improperly Requests This Court To Address Questions Which Were Not Timely Raised Below	7
III. The Ninth Circuit Court Of Appeals' Decision In This Matter Fully Considered And Correctly Decided The Issues Based On The Federal Law And This Court's Prior Decisions	9
A. The Ninth Circuit Court of Appeals Properly Affirmed The District Court's Confirmation Of The Arbitration Award Pursuant To The Federal Arbitration Act	9
B. Arbitration Pursuant To The Federal Arbitration Act Is Appropriate For The Resolution Of Disputes Arising From The Alleged Antitrust Violations	13
CONCLUSION	20

TABLE OF CONTENTS – Continued

Page

APPENDIX CONTENTS

Plaintiff's Complaint For Damages, Peter Nghiem, Complainant, and NEC Electronics, Inc., Respondent, American Arbitration Association Case No. 74-30-0287-90 .....App. 1

Opinion And Decision of John Kagel, Arbitrator, Peter Nghiem, Complainant, and NEC Electronics, Inc., Respondent, American Arbitration Association Case No. 74-30-0287-90 .....App. 22

Brief of Defendant-Appellee NEC Electronics Inc., *Peter Nghiem v. NEC Electronics, Inc., et al.*, Case No. 92-16155 in the United States Court of Appeals for the Ninth Circuit.....App. 38

Opposition of Defendant-Appellee NEC Electronics Inc. to Plaintiff-Appellant Peter Nghiem's Revised Reply Brief, Case No. 92-16155 in the United States Court of Appeals for the Ninth Circuit.....App. 73

Excerpts from Transcript of Arbitration Proceedings In the Matter of a Controversy Between: Peter Nghiem and NEC Electronics, American Arbitration Association Case No. 7340-0287-90 .....App. 85

TABLE OF AUTHORITIES

Page(s)

CASES

American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).....13, 14, 15, 16, 17

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884 (1990)..... 19

Fortune Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355 (9th Cir. 1983)..... 11

FSLIC v. Butler, 904 F.2d 505 (9th Cir. 1990).....9, 12

Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2d Cir. 1987) 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647 (1991) 17

Goodman v. Lukens Steel Co., 428 U.S. 656 (1987)..... 16

Hull v. NCR Corp., 826 F. Supp. 303 (E.D.Mo. 1993) 13

Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984)..... 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S. Ct. 3346 (1985).....14, 15, 16, 17, 18

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464 (1984)..... 20

Nghiem v. NEC Electronics, Inc., 25 F.3d 1437 (9th Cir. 1994) 5

Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F.2d 580 (5th Cir. 1980)..... 11

Ralph Andrews Productions v. Writers Guild, 938 F.2d 128 (9th Cir. 1991)..... 11

TABLE OF AUTHORITIES – Continued

Page(s)

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332 (1987) 17, 18

Tenney Engineering, Inc. v. United Electric Radio and Machine Workers, 207 F.2d 450 (3d Cir. 1953) 12

U.S. v. Williams, ___ U.S.___, 112 S. Ct. 1735 (1992) ..7, 12

United Electric, Radio & Mechanical Workers v. Miller Metal Products, 215 F.2d 221 (4th Cir. 1954) 13

STATUTES

9 United States Code

section 1 ..... 2, 9, 12

section 2 .....1, 10

15 United States Code

section 1 .....2, 20

section 15 .....2, 19

28 United States Code

section 1254(1)..... 1

section 1651(a).....1, 6

Rules of the Supreme Court of the United States

Rule 10..... 7

Rule 14.1.(g)..... 2

Rule 20.....1, 6, 7, 20

Rule 20.1.....6, 7

OTHER AUTHORITIES

G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L.Rev. 623 (1988) 18

No. 94-677

In The

Supreme Court of the United States

October Term, 1994

PETER P. NGHIEM,

Petitioner,

v.

NEC ELECTRONICS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was decided on June 3, 1994. Petitioner invokes the jurisdiction of this Court under the Rules of the Supreme Court of the United States, Rule 20, 28 U.S.C. Section 1254(1), and 28 U.S.C. Section 1651(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (hereinafter referred to as "FAA"), 9 U.S.C. § 2, provides, in pertinent part, that an agreement in writing to submit to arbitration

an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract. Section 1 of the FAA, 9 U.S.C. § 1, provides an exception to section 2 for contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

15 U.S.C. § 1 declares that every contract, combination or conspiracy in restraint of trade or commerce is illegal. 15 U.S.C. § 15, in pertinent part, provides that standing to assert an antitrust claim inures to any person who is injured in his business or property by reason of anything forbidden in the antitrust laws.

The Respondent, NEC Electronics, Inc. (hereinafter "Respondent" or "NECEL"), respectfully requests that this Court deny the Petition for Writ of Certiorari in which Petitioner, Peter P. Nghiem (hereinafter "Petitioner" or "Nghiem"), seeks review of the Ninth Circuit Decision filed June 3, 1994 in this case. Said Decision is set forth at page 1a of the Appendix A to the Petition for Writ of Certiorari (hereinafter "Pet. App. A") filed by Petitioner herein.

STATEMENT

Rule 14.1.(g) of the Rules of the Supreme Court of the United States requires that a petition for writ of certiorari include a concise statement of the case containing the facts material to the consideration of the questions presented. Petitioner's statement of the case does not comply

with the foregoing mandate. (*See*, Petition for Writ of Certiorari filed by Petitioner Peter Nghiem, hereinafter cited as "Pet.," at 4-9.) To assist this Court in the exercise of its discretionary jurisdiction, Respondent NECEL herein below sets forth the material facts and the proceedings with citations to the record.

STATEMENT OF THE CASE

Petitioner Peter Nghiem, an American citizen of Vietnamese heritage, was employed by Respondent NECEL from August 31, 1989, until he was fired in June 1990. (Pet. App. A at 2a; District Court's Order Granting Defendant's Motion for Confirmation of the Arbitration Award and Dismissal of Action included in Petitioner's Appendix C (hereinafter "Pet. App. C") at 14a-15a.) Nghiem signed an employment contract on August 31, 1989, which did not contain an arbitration clause. (Pet. App. A at 2a.) On September 5, 1989 and May 7, 1990, Nghiem signed acknowledgements of receipt of NECEL's company handbook which explained that NECEL maintained a "Problem Resolution Process" for "disputes, problems, complaints or claims" raised by employees arising out of their own or the company's conduct or the employment relationship, including its termination. (Pet. App. A. at 2a-3a; Pet. App. C. at 15a.) NECEL's problem resolution process concludes in its "Step 4" with "final and legally binding" arbitration according to its express terms. (Pet. App. A at 3a; Pet. App. C at 15a.) Significantly, Nghiem claims that he did not sign a modified version of NECEL's employment contract because it contained a

clause for binding arbitration. (Pet. App. A at 2a.) Nonetheless, Nghiem voluntarily initiated binding arbitration in a written letter to NECEL's Human Resources Director, Denny Mitchell, requesting to proceed with Step 4 of NECEL's problem resolution process – final and binding arbitration. (Pet. App. A at 4a; Pet. App. C at 15a.)

As a result of Petitioner following the problem resolution process through its four steps into arbitration, an arbitration hearing was held before Arbitrator John Kagel in a proceeding before the American Arbitration Association. (Pet. App. C at 15a.) Nghiem presented evidence and argument in the arbitration hearings, including a 50-page closing brief. (Pet. App. A at 3a; Pet. App. C at 15a.)

The Arbitrator then issued a decision dated November 18, 1991, denying Appellant all his requested relief. (Pet. App. A at 3a; Pet. App. C at 15a.) According to the Arbitrator, and as expressly set forth in Nghiem's arbitration complaint, the claims raised in Nghiem's arbitration complaint include the following: "wrongful termination, breach of implied contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, defamation and antitrust . . . . " (Arbitration Award attached hereto as Respondent's Appendix (hereinafter "Res. App.") 22-23; Nghiem's Arbitration Complaint attached hereto as Res. App. 1.) The Arbitrator also addressed and ruled against Nghiem on the fraudulent misrepresentation and race discrimination allegations. (Res. App. 36.) On November 27, 1991, Nghiem wrote the American Arbitration Association ("AAA") to request a trial de novo and to argue that the arbitration was not binding on him. (Pet. App. A at 3a.)

On June 10, 1991, while the arbitration was proceeding, Nghiem filed suit in state court on substantially the same issues. (Pet. App. A at 3a.) NECEL removed the state action to federal district court on March 6, 1992. On June 9, 1992, the Honorable Ronald M. Whyte of the U.S. District Court for the Northern District of California granted NECEL's motion for confirmation of the arbitration award and dismissed Petitioner's complaint in its entirety, including the statutory claims of employment discrimination and antitrust violation. (Pet. App. C at 17a.)

Petitioner appealed the district court's decision on October 14, 1992. On June 3, 1994, the Ninth Circuit Court of Appeals affirmed the district court's confirmation of the arbitration award and dismissal of Petitioner's action, in a decision reported as *Nghiem v. NEC Electronics, Inc.*, 25 F.3d 1437 (9th Cir. 1994). Nghiem filed a Petition for Rehearing with Suggestion for Rehearing En Banc on June 17, 1994. (Pet. App. D at 19a.) Rehearing was denied on July 14, 1994, and no judge of the Ninth Circuit requested a vote on the en banc suggestion. (Pet. App. B at 12a-13a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Fails To Present Grounds For The Issuance Of An Extraordinary Writ Authorized By 28 U.S.C. Section 1651(a) Under Supreme Court Rule 20.

The Petition invokes the jurisdiction of this Court under the provisions of 28 U.S.C. section 1651(a) and Rule 20 of the Supreme Court Rules. (Pet. at 1-2.) The issuance of an extraordinary writ is not a matter of right, and discretion should be sparingly exercised. Supreme Court Rule 20.1. In order to justify the granting of any writ under 28 U.S.C. section 1651(a), Petitioner must show: (1) that the writ will be in aid of this Court's appellate jurisdiction; (2) that there are exceptional circumstances warranting the exercise of this Court's discretionary powers; *and* (3) that adequate relief cannot be obtained in any other form or from any other court. *Id.* Petitioner has failed to show the presence of exceptional circumstances warranting the exercise of this Court's discretionary powers.

Petitioner claims exceptional circumstances arising exclusively from the fact that "all other possible avenues of potential relief in federal courts have been exhausted but Petitioner's constitutional right to due process and his causes of action under Title VII and antitrust laws were still not considered."[1] (Pet. at 11.) This is merely a

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[1] The reason Petitioner's newly-raised claim of a constitutional right to due process has not been considered is because it has never been timely raised in any proceeding by the Petitioner, as discussed below. Moreover, Petitioner's causes of

restatement of the third requirement cited in Supreme Court Rule 20.1; in other words, Petitioner would have this Court find that exhaustion of all judicial avenues is, per se, an exceptional circumstance. Petitioners who seek this Court's review are almost always out of judicial alternatives because this Court is the ultimate court of last resort. As such, "exceptional circumstances," as defined by Petitioner, would almost always exist, but clearly do not on this basis alone. Consequently, there are no exceptional circumstances warranting the exercise of this Court's discretionary powers to issue an extraordinary writ.[2]

II. The Petition Improperly Requests This Court To Address Questions Which Were Not Timely Raised Below.

The traditional rule of this Court precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *U.S. v. Williams*, ___ U.S.___, 112 S. Ct. 1735, 1738 (1992). The Petitioner's first question presented for review is whether the due process clause of the Fourteenth Amendment of the U.S. Constitution precludes federal courts from dismissing Petitioner's cause

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action under Title VII and antitrust laws were considered in the arbitration and decided against Petitioner, also as discussed below.

[2] Although not identifying Supreme Court Rule 10 as a basis for jurisdiction, it appears that Petitioner may have intended such jurisdiction. Consequently, even though no jurisdiction exists under Supreme Court Rule 20, Respondent will address this petition according to Rule 10 in the alternative.

of action without affording him an opportunity for a judicial hearing on the merits. (Pet. at i.) Petitioner contends that the due process requirements have not been fulfilled because "Petitioner received an arbitrary and capricious arbitration award in favor of NECEL. Such award was procured by undue means, witness perjury and, as being in manifest disregard of the law, abuse of discretion and evident partiality of the arbitrator." (Pet. at 12.) However, these arguments were not timely raised below, and they were not briefed or debated by the parties.

On December 28, 1992, Petitioner filed a *reply* brief with the court of appeals arguing that the confirmation of the "irrational" arbitration award and dismissal of Petitioner's action manifest injustice and deprive Petitioner of his due process. (Pet. App. E at 62a.) Petitioner based this due process argument on the same asserted facts supporting the present due process argument; namely, "the arbitration award is irrational and procured by fraud, undue means, manifest disregard of law, and evident partiality and misconduct of the arbitrator." *Id.* Respondent, however, objected to consideration of this claim, asserting quite correctly that it was wholly improper to raise such an argument for the first time at this late stage as Petitioner had done. (Res. App. 70-80.)

The Ninth Circuit responded to Petitioner's "due process" contentions by agreeing completely with Respondent, stating as follows:

> Finally, Nghiem argues that the arbitrator's decision was arbitrary and capricious. Not only was this argument not made in the district court, but Nghiem raises it for the first time in

> his reply brief. Nghiem now alleges witness perjury, procurement of arbitration award by undue means, arbitrator's manifest disregard of the law, and misconduct.
>
> We dismiss these arguments as untimely raised. An appellate court will dismiss arguments not raised at the district court, unless there are exceptional circumstances. *FSLIC v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990). Nghiem does not even attempt to show exceptional circumstances.

(Pet. App. A at 10a-11a.) It is clear that Petitioner's due process arguments were neither passed on by the district court or the court of appeals, nor were they properly pressed by the Petitioner. As such, Respondent had no opportunity to brief or debate the issue below, and the court of appeals properly refused to consider it. Accordingly, the writ must be denied to the extent it seeks to raise these same issues now.

III. The Ninth Circuit Court Of Appeals' Decision In This Matter Fully Considered And Correctly Decided The Issues Based On The Federal Law And This Court's Prior Decisions.

A. The Ninth Circuit Court of Appeals Properly Affirmed The District Court's Confirmation Of The Arbitration Award Pursuant To The Federal Arbitration Act.

Nghiem's predominant contention at the district court and in his appeal to the Ninth Circuit was that he was not bound by the Arbitrator's decision because the Federal Arbitration Act ("FAA"), 9 U.S.C. sections 1-14,

requires an agreement to arbitrate to be in writing. 9 U.S.C. § 2. Petitioner relied on the fact that the employment contract which he signed does not contain an arbitration clause and that he refused to sign a proposed subsequent contract which included an arbitration clause. (Pet. App. A at 3a.) The Ninth Circuit rejected Nghiem's contention that NECEL forced him to pursue arbitration because that contention was inconsistent with his claim that he had consciously avoided signing an agreement which would require him to pursue arbitration. Therefore, the court upheld the district court's factual finding that Nghiem voluntarily initiated binding arbitration.

Nghiem argues that the arbitration could not be binding on him because the arbitration clause was not included in his employment contract. The Ninth Circuit correctly ruled that, while the FAA requires a writing, it does not require that the writing be signed by the parties. (Pet. App. A at 4a, citing, *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987).) The binding arbitration agreement was written in two separate sources: (1) the employee handbook, which Nghiem acknowledged receiving on September 5, 1989 and May 7, 1990; and (2) in a letter written by Nghiem to NECEL's Human Resources Director requesting to proceed with Step 4 of NECEL's problem resolution process. Step 4 expressly provided that: "The decision of the arbitrator will be final and legally binding on the company and the employee to the full extent permitted by law." (Pet. App. C at 15a.) Nghiem's request to pursue this process constitutes a written memorialization of his intention to submit to arbitration, as determined by the district court and the

Ninth Circuit Court of Appeals. (Pet. App. A at 4a; Pet. App. C at 16a.)

As an alternative, the court of appeals correctly concluded that the agreement to arbitrate could be implied from the conduct of the parties. (Pet. App. A at 4a-5a.) The court reasoned that Nghiem voluntarily initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief of 50 pages. Despite the fact that Nghiem filed his state court suit prior to the announcement of the Arbitrator's decision, the decision was still binding because Nghiem submitted to the authority of the Arbitrator and pursued the arbitration. (Pet. App. A at 5a.) As the court of appeals accurately observed, it would have been unreasonable and unjust to allow Nghiem to participate in the arbitration process for several months and then challenge the legitimacy of the arbitration process shortly before the Arbitrator announced his decision. (Pet. App. A at 4a-5a, citing *Fortune Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983).)

Finally, the court of appeals correctly concluded that Nghiem's voluntary initiation of arbitration could be interpreted as a waiver of any objection he may have had over the authority of the Arbitrator. (Pet. App. A at 5a.) This is merely a reflection of the axiom that, whether a party may have refused to arbitrate an issue, when the party instead proceeds to arbitration, the party no longer has the right to raise the issue that its claim should not have been subject to binding arbitration. *Ralph Andrews Productions v. Writers Guild*, 938 F.2d 128, 130 (9th Cir. 1991); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly*

Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F.2d 580, 584 (5th Cir. 1980).

Clearly, this application of the FAA and prior judicial authority are not in conflict with the decisions of other courts of appeal, nor do they involve an important federal question. Instead, it is clear that resolution of this case was dependent on the unique facts before the court; namely, Plaintiff's written request to voluntarily initiate Step 4 of the problem resolution process, including final and binding arbitration.[3] The Ninth Circuit identified

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[3] Petitioner contends that this Court should grant the petition in order to determine the meaning of the "contracts of employment" exception in 9 U.S.C. section 1. This argument was not presented to the district court or in Petitioner's moving papers to the court of appeals. In fact, Petitioner first presented this argument in his reply brief to the court of appeals, causing Respondent to object to its consideration for this reason. (Res. App. 77-78.) While the Ninth Circuit did not expressly address this objection, its decision also did not address Petitioner's argument in this respect, presumably relying on the rule that an appellate court will dismiss arguments not raised at the district court, unless there are exceptional circumstances. *FSLIC v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990.) Nghiem made no effort to show exceptional circumstances on appeal, and likewise makes no attempt here. (Pet. App. A at 11a.) This Court is precluded from addressing questions which were not "pressed or passed upon below." *U.S. v. Williams*, ___ U.S. ___, 112 S. Ct. 1735, 1738 (1992). Since the applicability of the "contracts of employment" exception was neither pressed, passed upon nor debated below, certiorari must be denied. In any event, the FAA only excludes from its coverage contracts of employment for workers *directly* involved in international or interstate commerce. 9 U.S.C. § 1. This has uniformly been held to apply only to seamen and railroad workers or employees *actually* engaged in the movement of interstate or foreign commerce. *See, Tenney Engineering, Inc. v. United Electric Radio and Machine Workers*, 207 F.2d 450

three correct alternatives for enforcing the arbitration over Nghiem's protestations. Therefore, this writ should be denied, as review on such basis is completely unnecessary.

B. Arbitration Pursuant To The Federal Arbitration Act Is Appropriate For The Resolution Of Disputes Arising From The Alleged Antitrust Violations.

Petitioner contends that certiorari should be granted because of a purported conflict between decisions in the courts of appeals regarding the arbitrability of antitrust claims. (Pet. at 17.) This argument is not based on a conflict, but rather on the Ninth Circuit's decision to overrule *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984) and, further, to refuse to follow the 1968 Second Circuit case, *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). (Pet. at 17.) Petitioner asserts that it is somehow erroneous for the Ninth Circuit to follow the holding of this Court's

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(3d Cir. 1953); *Hull v. NCR Corp.*, 826 F.Supp. 303 (E.D. Mo. 1993); *but see, United Electric, Radio & Mechanical Workers v. Miller Metal Products*, 215 F.2d 221 (4th Cir. 1954) (FAA may not be relied upon to compel enforcement of the arbitration clause in collective bargaining agreement.) The arbitration clause at issue here is not within a collective bargaining agreement, nor is Petitioner a seaman, railroad worker, or an employee actually engaged in the movement of interstate or foreign commerce. Thus, even if this issue had been properly raised below, it is clear that the exclusionary clause in section 1 of the FAA is not applicable to Petitioner.

decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S. Ct. 3346 (1985), rather than inconsistent lower court decisions. However, the Ninth Circuit properly applied the rules set down by this Court in *Mitsubishi*.

Although *Mitsubishi* found "it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to a grievance to arbitrate arising from domestic transactions," it is clear that this Court's systematic demolition of the foundation of *American Safety* makes its continuing viability questionable, at best. 473 U.S. at 629, 105 S. Ct. at 3355. In *Mitsubishi*, this Court announced its "skepticism" of certain aspects of the *American Safety* doctrine," and refused to accept its holding that antitrust claims are not suited for arbitration. *Id.* After reviewing the policies and rationale which guided the Second Circuit in reaching its decision in *American Safety*, this Court concluded that the concerns expressed in *American Safety* were no longer valid. 473 U.S. at 632-640, 105 S. Ct. at 3356-3360.

Mitsubishi identified the four ingredients which compromise the *American Safety* doctrine:

> First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, 'the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract.' Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are 'ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic

> concepts of common sense and simple equity.' Finally, just as 'issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values.' *See, American Safety*, 391 F.2d, at 826-827.

473 U.S. at 632, 105 S. Ct. at 3356-3357.

This Court in *Mitsubishi* then proceeded to specifically refute each ingredient of the *American Safety* doctrine. First, the *Mitsubishi* decision determined that the mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the demonstrated assumption that the arbitration clause is tainted. 473 U.S. at 632-633, 105 S. Ct. at 3357. To the contrary, the party resisting arbitration may attack the validity of the arbitration agreement or attempt to have the agreement set aside by showing: (1) fraud, undue influence, or overweening bargaining power; (2) that enforcement would be unreasonable and unjust; or (3) that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court. *Id.* This Court thus concluded in *Mitsubishi*, in a manner entirely consistent with the court of appeals decision herein, that absent such a showing there is no basis for assuming the forum inadequate or its selection unfair.[4] *Id.*

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[4] Petitioner suggests that the court of appeals did not consider his contention that there was fraud in the inducement

Second, this Court in *Mitsubishi* also determined that potential complexity of antitrust issues should not suffice to ward off arbitration because "[t]he anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." 473 U.S. at 633, 105 S. Ct. at 3357.

Third, regarding arbitrator bias, this Court in *Mitsubishi* then took note that international arbitrators are frequently drawn from the legal and business communities, and refused "to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." 473 U.S. at 634, 105 S. Ct. at 3357-3358.

Lastly, this Court addressed the "core of the *American Safety* doctrine – the fundamental importance to American democratic capitalism of the regime of the antitrust laws." 473 U.S. at 634, 105 S. Ct. at 3358. The private litigant's chief tool in the antitrust enforcement scheme

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relating to the arbitration provision. (Pet. at 14.) However, both the district court and court of appeals made a factual determination that Nghiem *voluntarily* initiated final and binding arbitration. (Pet. App. C at 16a-17a; Pet. App. A at 4a.) "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 428 U.S. 656, 665 (1987). A finding that Nghiem "voluntarily" initiated the arbitration precludes a factual determination that he was fraudulently induced to pursue arbitration.

and the primary deterrent to potential violators is the treble damages provision of the antitrust laws. The importance of the treble damages provision, however, does not compel the conclusion that it may not be sought outside an American court, "[a]nd so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral form, the statute will continue to serve both its remedial and deterrent function." 473 S. Ct. at 635, 105 S. Ct. at 3358-3359.

Any question as to the continuing validity of the *American Safety* doctrine has been dispelled by this Court's further statements in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991). This Court interpreted *Mitsubishi* broadly:

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act . . . . See, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed. 2d 444 (1985); . . . .

111 S. Ct. at 1652. This point was reiterated: "the Sherman Act . . . [is] designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration." 111 S. Ct. at 1653.

Finally, this Court has relied upon *Mitsubishi* to support the enforcement of arbitration agreements when a party bound by an agreement raises a claim founded on statutory right. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987). In *McMahon*, the court of appeals distinguished this Court's

reasoning in *Mitsubishi*, concerning the arbitrability of antitrust claims, on the ground that it involved international business transactions and did not affect the law "as applied to agreements to arbitrate arising from domestic transactions." 482 U.S. at 224, 107 S. Ct. at 2336. This Court held "although the holding in *Mitsubishi* was limited to the international context, see *Id.* at 629, 105 S. Ct., at 3355, much of the reasoning is equally applicable here." 482 U.S. at 239, 107 S. Ct. at 2344. Applying the *Mitsubishi* analysis to domestic claims of violations of section 10b of the Securities and Exchange Act of 1934, 15 U.S.C. section 78j(b), and RICO, 18 U.S.C. section 1961, this Court concluded that a contractual provision providing for compulsory arbitration was enforceable under the FAA. 482 U.S. at 238, 242, 107 S. Ct. at 2343, 2346. Thus, the Ninth Circuit was correct in determining that the *McMahon* analysis, in combination with the FAA, *"can only mean* the judicially implied *antitrust exemption to the FAA no longer exists."* (Pet. App. A at 10a; quoting G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L.Rev. 623, 624 n.7 (1988) (citations omitted) (emphasis by 9th Cir.).)

Petitioner's real basis for seeking certiorari is not some unspecified conflict between the courts of appeals in different circuits, but rather that "both the district court and the Ninth Circuit overlook the very important fact that Petitioner's causes of action under antitrust laws was [*sic*] not ruled by the arbitrator." (Pet. at 17.) However, this clearly is not the case. Nghiem's arbitration complaint expressly submitted the antitrust claims to the Arbitrator. (Res. App. 19-21.) The Arbitrator's decision found that "Nghiem makes no argument with respect to his claimed

violations of anti-trust law by NECEL towards him. Accordingly, that claim is considered to be abandoned and will not be further discussed." (Res. App. 25.)

In fact, at the hearing, the Arbitrator informed Petitioner that he had the burden of establishing an antitrust violation. (Res. App. 5 at 83.) Further, the Arbitrator informed plaintiff "assuming that you prove all your facts, that's it on the – you do that if you want to pursue the antitrust claim." (Res. App. at 96.) Despite this warning, Petitioner did not prove any facts, or even argue such facts in his 50-page closing brief, relating to the antitrust claims. Therefore, the Arbitrator correctly concluded that Petitioner abandoned his antitrust claim. He may not resurrect it at this point.[5]

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[5] In any event, it is unnecessary for this Court to decide the issue of whether antitrust claims are arbitrable because the Petitioner neither has standing to sue nor has he alleged an antitrust violation. Since the proceedings below did not continue beyond confirmation of the arbitration award, this point was not raised or addressed by the lower courts. However, it is clear that, in order to have standing to assert an antitrust claim, Plaintiff must prove an antitrust injury; that is, an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the Defendant's acts unlawful. 15 U.S.C. § 15; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S. Ct. 1884, 1889 (1990). Petitioner's Arbitration Complaint alleged Defendant's violations of antitrust laws were a "substantial factor in causing damage and injury to Plaintiff as set forth in paragraphs 18, 19 and 20." (Res. App. 21, ¶ 45.) Paragraphs 18, 19 and 20 seek recovery for emotional distress, punitive damages for Defendant's managers acting in a deliberate, cold, intentional and unfeeling manner in order to injure and damage Plaintiff, and treble damages for Defendant's employer's deliberate furnishing of incorrect information

CONCLUSION

This Petition must be denied. Petitioner has failed completely to establish an exceptional circumstance justifying issuance of an extraordinary writ pursuant to Rule 20 of the Supreme Court Rules. Petitioner's mere exhaustion of his judicial avenues certainly is not an exceptional circumstance warranting this Court's review. In addition, this Court should not consider Petitioner's due process argument or his contention that the arbitration is not enforceable under the FAA because these arguments were neither timely raised nor argued below.

For the issues which have been properly raised in the Petition, the Ninth Circuit Court of Appeals fully considered and correctly decided all such issues. No split among the lower courts on any legitimate issue raised in

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regarding the reasons for Petitioner's discharge, respectively. (Res. App. 14, ¶¶ 18, 19, 20.) Clearly, these are neither the types of injuries the antitrust laws were intended to prevent, nor are they the type of injury which flows from that which makes antitrust acts unlawful. Even if Petitioner had standing, his allegations, as a matter of law, cannot state an antitrust cause of action. An antitrust violation requires the existence of a contract, combination or conspiracy. 15 U.S.C. § 1. Independent action is not proscribed. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 1469 (1984). However, Petitioner's Arbitration Complaint only alleges that "Defendant employer deliberately interfered with the COT business development," and there was a "conspiracy to secretly hamper the COT business development by Defendant employer . . . . " (Res. App. 19, 20, ¶¶ 40, 42.) Respondent's conspiracy with itself to interfere with its own business cannot support an antitrust claim. As a result, this case does not in any way adequately present any antitrust arbitration issues since Petitioner simply has no legitimate antitrust claim.

Petitioner's case has been identified. Finally, this case rests upon its own unique facts. Both lower courts made the factual determination that Petitioner voluntarily requested arbitration in writing and vigorously pursued the arbitration, including filing a 50-page closing brief. Petitioner only complained of the arbitration after the Arbitrator, considering all the evidence presented, ruled Petitioner's claims were entirely devoid of merit. Such factual circumstances simply do not raise any issues deserving of this Court's consideration through a writ of certiorari.

For these reasons, the Petition for Writ of Certiorari and/or an Extraordinary Writ should be denied.

DATED: November 11, 1994

Respectfully submitted,

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Plaintiff

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between Plaintiff: PETER NGHIEM vs Defendant: NEC ELECTRONICS INC.	Case No. 74-30-0287-90 COMPLAINT FOR DAMAGES 1. WRONGFUL TERMINATION 2. BREACH OF IMPLIED CONTRACT 3. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING 4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS 5. DEFAMATION AND CAREER DAMAGE 6. ANTITRUST VIOLATION

Plaintiff for his causes of action states:

FIRST COUNT: WRONGFUL TERMINATION AGAINST DEFENDANT NEC ELECTRONICS INC.

1. This is a complaint by plaintiff, a discharged former employee, against the ex-employer, NEC Electronics Inc., for damages arising out of the termination of employment. Plaintiff seeks compensatory and punitive damages.

2. At all times herein mentioned:

a. Defendant, NEC Electronics Inc., was and is a corporation with its headquarters in Mountain View, California. Its parent company, NEC (Nippon Electric Company) Corporation, has headquarters located in Tokyo, Japan. Defendant is in the business of manufacturing semiconductor products such as DRAM, ASIC gate arrays and standard cells, and microprocessors.

b. Each of defendants, Mr. Hiro Hashimoto, Mr. Grant Hulse and Dr. H. Yoshizawa, were and are managerial employees of NEC Electronics Inc.. Mr. Hiro Hashimoto was and is the ASIC General Manager, Mr. Grant Hulse was and is the ASIC Product Marketing Manager, and Dr. H. Yoshizawa was and is the National CAD Manager.

c. The term "defendant employer" will refer to defendant NEC Electronics Inc. acting by and through Mr. Hiro Hashimoto, Mr. Grant Hulse and Dr. H. Yoshizawa, and each of them, unless otherwise indicated.

3. Plaintiff, Peter Nghiem, was employed by NEC Electronics Inc. from August 31, 1989 to June 11, 1990 when he was fired allegedly on charges of insubordination, unsatisfactory work performance and unprofessional conduct. These charges were false, as will be described below.

4. Plaintiff were employed by defendant employer under an oral contract of employment as modified by certain policies, practices, assurances and other statements, both oral and in writing, of defendant employer. Plaintiff had a contract of employment for an indefinite term. As long as plaintiff performed his job satisfactorily, this indefinite term will continue. The term "at will" is not specified in plaintiff's employment contract which implies that discharge, if any, would only be for good cause proven. Therefore, plaintiff had an expectation of continued employment with discharge only for good cause based on the following:

a. Plaintiff signed the "Employment, invention and confidential information agreement with defendant employer on August 31, 1989 which does not specify his employment is "at will" (Exhibit S1).

b. Defendant employer published an employee handbook, a partial of which is attached hereto (Exhibit S2) and is incorporated by reference. Among other things:

(1) Page 1.4 of this manual stated " . . . we hire and reward outstanding people – team players with a can-do, customer first orientation." and "We believe in getting and rewarding results by recognizing achievement, basing advancement in the company on initiative, and demonstrated accomplishment."

(2) Page 1.5 of this manual stated "We also believe in the value of a responsive environment, one that respects personal dignity . . . We expext [sic] a great deal in return: simply your loyalty and your best,"

(3) Page 2.10 of this manual mentioned about the complaint procedure where "if you believe it would be inappropriate to discuss the matter with your supervisor, report it directly to the head of your department or to your Human Resources representative, who will undertake an investigation. Your complaint will be kept confidential to the maximum extend [sic] possible."

(4) Page 5.1 of this manual stated "NECEL is sincerely interested in your personal welfare and makes a great effort to be considerate and fair."

c. Defendant employer promulgated a written company problem resolution process which includes four steps to provide employee with four opportunities to review concerns with his immediate superior, with his functional vice president, with the Personnel Committee, and with an arbitrator (Page 5.2 to page 5.3 of the Employee Manual).

d. Plaintiff occupied a position of importance and responsibility. Plaintiff was a Senior Product Marketing Engineer with a title "COT/CAD Product Manager" in his business card (Exhibit 48). Plaintiff was given two important and major job assignments in COT business development and CAD strategic marketing management. In the second day on the job Plaintiff received the memo dated September 1, 1989 (Exhibit 18) from defendant employer which clearly specified his responsibilities as followed:

"Peter will have business development responsibilities for COT business. After analyzing our capabilities and the competitive environment, he will drive the development of a cohesive business plan for the US

market. He will coordinate the start of business action plans with each region's targets.

Peter will also have strategic marketing management responsibilities for all ASIC CAD products and relationships. This includes vendor relationships and joint programs, marketing strategies, CAD sales tools, merchandising, competitive analysis, CAD analysis of target accounts, etc."

e. In the first week of employment, defendant employer, in his presentation of the organization, verbally promised to promote plaintiff to either a Product Marketing Manager or a Regional Business Manager after plaintiff completes the first two assignments which were to promote the COT business development and CAD strategic marketing management.

f. Plaintiff received several oral commendations for his work performance and professional attitude in dealing with other people from defendant employer throughout the period of employment particularly in the first seven months. On several occasions defendants praised plaintiff for doing an excellent job in both the two assigned areas, CAD and COT strategic marketing.

g. Plaintiff received several written commendations for his work in the joint marketing activities and vendor relationships from different CAD vendors. A few samples of these written commendations are shown in Exhibit 34, 35, 36, 37, 38 and 39.

h. Plaintiff received good overall performance evaluations (Exhibit 28) although one part of the performance evaluation was rated below average on organizational and team relationship which contradicted with previous oral commendations from company management.

i. Plaintiff had a history of outstanding job performance from his previous positions at Raytheon Semiconductor Division, Fujitsu Microelectronics Inc. and Advanced Micro Devices. Plaintiff also received satisfactory and above-average performance evaluation from his present employer, Toshiba America Electronic Components, Inc. (Exhibit S3).

j. Plaintiff had a significant length of experience in product marketing of around three and a half years and had worked in the ASIC semiconductor industry for six and a half years.

k. Plaintiff had worked as a Senior Product Marketing Engineer since January of 1988 and held a BS degree in Electrical & Electronic Engineering and an MS degree in Engineering Management. Plaintiff had also done graduate work in Computer Engineering.

l. Plaintiff received specific assurances from his superior that the company intended to keep him on the job as long as he continued to perform satisfactorily. His superior also promised to promote him to a Product Marketing Manager or a Regional Business Manager after he completed the first two assignments. In [sic] several occasions, Plaintiff was told by his superior that he needed Plaintiff and wanted Plaintiff to stay in his group

to develop the COT business and CAD marketing activities when Plaintiff was thinking of moving to another group within the company.

m. In the ASIC Product Planning meeting in Japan on November 16, 1989, Plaintiff received a favorable response from the Product Planning and Business Development Committee for his COT Strategic Marketing Plan which also included CAD marketing and development strategies.

n2. Mr. T. Takai, CMOS Engineering Dept. Manager, and Mr. T. Takahashi, ECL Engineering Assistant Dept. Manager, who represented NEC corporate, suggested NECEL to send two resident US engineers to NEC Tokyo for IC process technology training in order to support COT business in the US. The Product Planning committee also agreed to assign an engineering manager in Japan to work full time on the COT project to support US customers.

m2. A few weeks after the Product Planning Meeting on November 16, 1989, defendant employer, Mr. Hiro Hashimoto, told plaintiff that he would requested [sic] NEC Corporate to send two resident Japanese engineers to the US to provide COT technical support instead of sending US engineers to Japan for training for this purpose. He also stated that one of the candidate [sic] will translate japanese [sic] documents into english [sic] in order to set up a technical data base to support COT customers as part of the COT business development plan proposed by plaintiff.

(1) Mr. Hashimoto had several times told plaintiff before and after the Product Planning meeting in

Tokyo that a COT engineering group would be formed and managed by Mr. Kevin On, Western Design Center Manager, to provide technical support to US COT customers. Mr. Kevin On denied any of such assignment and confirmed that he was only responsible for one particular COT customer in the region.

(2) Early in March of 1990, plaintiff was told by both Mr. Hashimoto and Mr. Hulse that Mr. K. Endo, from NEC Corporate in Tokyo, is assigned to NECEL as a technical liaison person to request technical information from Japan and prepare technical documentation for COT customers. Plaintiff went to Mr. K. Endo to request COT support and found out that Mr. K. Endo did not know anything about this COT assignment. Furthermore, Mr. K. Endo informed plaintiff that he was assigned to work full time on the CAD project only.

(3) Plaintiff had made several trips to Roseville plant to gather information on pricing, contract and process engineering support for COT business. He was assigned to generate COT pricing by his superior but he encountered unreasonable obstruction from Mr. Hideto Goto when he asked him for information on process technology and manufacturing cost such as wafer process yield and cost, test and assembly cost, wafer and assembly capacity and overhead cost in order to generate the die price matrices with price adders for different packages for different process technologies available at Roseville manufacturing plant. Mr. Hideto Goto was assigned as the focal point of contact in Roseville for COT process engineering support. Apparently, COT customers had problems in getting technical information and support from Mr. Hideto Goto.

(4) Up to the time that plaintiff was discharged from the company on June 11, 1990, there was no engineer officially assigned to support COT customers. Plaintiff with the support of field sales personnel identify [sic] several COT design opportunities which were eventually turned down by defendant employer who did not set up the engineering support system as promised and refused to take the business by not providing necessary technical information.

(5) Plaintiff learned from the business records and co-employees that the COT business development was originally assigned to the former ASIC Assistant General Manager, Mr. R. Johnson, who was a former Vice President or Director of marketing at NCR. Mr. R. Johnson left NEC Electronics Inc. and went back to NCR after he spent around a year at NEC trying to promote the COT business activities without any success. Plaintiff joined NEC Electronics Inc. after Mr. R. Johnson had left and accepted the COT assigment [sic] as half of his responsibility. Within a short period of time, plaintiff successfully promoted the COT business development after he obtained a favorable acceptance of his COT/CAD Strategic Marketing Plan by the Product Planning Committee of NEC. The implementation of the first few steps of the COT business plan brought in several COT design opportunities. Around 18 COT customers with several COT design opportunities were identified and presented to NECEL's ASIC management who refused to take the business and frustrated prospective customers in the technical inquiry process.

n2. Right after plaintiff joined NEC Electronics Inc. with the assignment of CAD strategic marketing

management, he found out that the company was experiencing a major problem in the layout of gate arrays and standard cells which required the proprietary "place and route" software to be redeveloped from scratch in order to improve the routability percentage. These problems had great impact on the booking and development of gate array designs while the company got an extremely poor design win ratio in standard cell. NEC had generated around 60 standard cell quotes in the US for zero design win since the company did not have adequate CAD development tools for standard cell design.

(1) Plaintiff proposed the adoption and integration of third party US CAD vendor tools to NEC CAD design system to substitute inefficient proprietary CAD tools in his strategic marketing plan. Instead of redeveloping the layout software and several other CAD development tools from scratch internally, NEC decided to acquire CAD tools from US CAD vendors and integrate them to NEC CAD design system throughout the organization and worldwide.

(2) In December of 1989, plaintiff suggested to Dr. H. Yoshizawa to send out a Request For Proposal to three different CAD vendors to ask for information and proposal on IC CAD layout tools. This RFP led to a major CAD tool evaluation process of around three months performed by NEC Electronics Inc. with different US CAD vendors, a major joint CAD development project and a corporate wide technology partnership agreement with Cadence.

(3) Plaintiff and Mr. Ernie Frolichman, Senior Staff Contract Administrator, led the contract development and negotiation team to work on the terms, conditions and pricing of the technology partnership and production purchase which had a total value of around $20,000,000.00. Plaintiff also worked on other purchase contracts with Mentor SDD and Synopsys.

o. Until the events described below, plaintiff had not received any significant criticism. However, plaintiff did not get much support from employer management for the work he was assigned to do, particularly the promotion of COT marketing, sales and technical support activities. On the other hand, his superior coninued [sic] to attempt to take away his CAD projects when they were completed without proper notification.

5. On March 26, 1990, plaintiff received the performance evaluation which rated plaintiff above average in accountability and objective accomplishment. The performance job-related behavior was also rated from average to above average except the organization and team relationship skills. Since some of the reprimanding comments and examples stated in the performance evaluation contradicted with the actual facts, plaintiff told his superior that he did not agree with them and would respond to the unfair performance evaluation.

6. In April of 1990, plaintiff contracted Mr. Denny Mitchell, Director of Human Resources, for advice and was told to submit his complaint in writing so that personnel department could investigate the case.

7. On May 9, 1990, plaintiff submitted a written complaint to Mr. Denny Mitchell who, several days after

that, had to leave for a business trip in Japan. Before Mr. Mitchell left for Japan, he informed plaintiff that Mr. Hiro Hashimoto would facilitate a three way meeting to resolve the disputed issues and strengthen the teamwork spirit in his group. This three way meeting did not happen as noticed.

8. On May 24, 1990, without any warning at around 4:30 PM, Mr. Grant Hulse called plaintiff to a conference room in the front lobby for a private meeting. In this meeting, defendant employer tried to instigate an argument with plaintiff by brutally and falsely accusing him of taking compensation time and vacation time, and assigning meeting coverage to a peer without obtaining permission. One hour later at 5:35 PM, plaintiff found the first written warning and a notice for a meeting with personnel arranged by Mr. G. Hulse, left on his chair.

9. On May 31, 1990 in the meeting with Mr. Dave Nieto, Manger of Compensation and Benefits, and Mr. Hiro Hashimoto, Mr. Grant Hulse went through the list of fictitious incidents (Exhibit S4) quoted in the Termination Notice and falsely alleged that plaintiff was insubordinate, inefficient in his work performance and unprofessional in his conduct. In this meeting plaintiff was asked extensive questions but he was not allowed to respond with a complete answer.

10. On June 11, 1990, without warning, plaintiff was asked to go to a private meeting in the conference room in the front lobby where defendant employer asked plaintiff to resign. Plaintiff refused to resign and therefore, received a written termination notice which was effective

immediately. The reasons for discharge in the Termination for Cause memorandum dated June 11, 1990 were proved to be unwarranted and have no basis in facts in the light of substantial evidence (Exhibit S4). In these fictitious incidents, defendants conspired to humiliate, harass and intimidate plaintiff.

11. The actions of the above-said defendants violated company written policies which was [sic] described above in paragraph 4. Plaintiff was given the first warning right before he left for vacation and the warning itself is based on false and untrue incidents. There was no investigation of any charges against plaintiff. And plaintiff did not have the opportunity to present evidence. The company Problem Resolution Process provides employee [sic] with four opportunities to review concerns. But in this case, defendant employer fired plaintiff right at the first step. Apparently, the company did not treat plaintiff in a fair and honest manner and had furnished incorrect information in the Termination Notice regarding reasons for discharge.

12. After being wrongfully discharged, plaintiff has exhausted all administrative options to try to get the problem resolved following the four steps of company's Problem Resolution Process.

13. Employer rejected plaintiff's complaint at all three steps of the Problem Resolution Process without given [sic] any explanation and justification. In addition, the company specifically violated its own policies when it did not respond to plaintiff in a timely manner. Plaintiff did not received [sic] the response from the Personnel Committee at step 3 until 7 weeks after he submitted his

complaint letter. Furthermore, the response from the Personnel Committee was dated August 20, 1990 which was 4 weeks after submission date instead of 10 working days as specified in the company Problem Resolution Process.

14. Defendant employer took a further step to successfully deprive plaintiff of his unemployment insurance benefits, the only source of temporary income that plaintiff desperately needed and depended upon during the period of 19 weeks looking for another job. Plaintiff had to live on his retirement fund and money borrowed from his relatives.

15. Plaintiff was forced to seek employment for 19 weeks and accepted a job with a company in [sic] October 23, 1990 that cannot offer him comparable job position and comparable salary. Had he remained with NEC Electronics Inc., he would have been promoted to a Product Marketing Manager or a Regional Business Manager position after he completed the first two assignments as promised by his superior. Plaintiff had to accept a Junior Product Marketing position which was a career set back of over four years.

16. The above said acts of defendant employer constituted a wrongful termination of plaintiff which was a substantial factor in causing damage and injury to plaintiff as set forth below.

17. As a result of the foresaid acts of defendants, plaintiff has lost income and benefits, and will continue to lose income in an amount to be proven at time of hearing. Plaintiff claims such amount as damages together with prejudgment interest pursuant to Civil

Code Section 3287 and/or any other provision of law for prejudgment interest.

18. As a result of the aforesaid acts of defendants, plaintiff has become mentally upset, distressed and aggravated. Plaintiff had to take a psychotherapy [sic] under the prescription of a licensed psychologist to cure his mental distress and aggravation. Plaintiff claims general damages for such mental distress and aggravation.

19. Since employer managers acting [sic] in a deliberate, cold, intentional and unfeeling manner in order to injure and damage plaintiff, plaintiff requests an assessment of punitive damages against defendants..

20. Defendant employer who deliberately furnishes incorrect information regarding reasons for discharge of plaintiff, is also liable in tort for treble damages.

SECOND COUNT: BREACH OF IMPLIED CONTRACT AGAINST DEFENDANT

21. The allegations of paragraph [sic] 1 through 15, inclusive, are incorporated by reference.

22. Defendant expressly and impliedly led plaintiff to an expectation of continued employment through the job assignment and future promised position when the first two assignments were completed.

23. Plaintiff and defendant employer signed the "Employment, invention and confidential information agreement" which does not specify plaintiff employment is "at will".

24. The practice of the industry and the personnel policies and practices of employer as a giant japanese [sic] company reflect assurance of continued employment. Therefore, there exists an implied-in-fact promise for some form of continued employment. This independent consideration together with the promise of promotion and long term career growth within the company by defendant employer are sufficient to support a promise of job security.

25. Defendant employer acted in bad faith and committed the tort of wrongful discharge of employment when defendant impliedly led plaintiff to expect a continuing and long term employment, and then discharged plaintiff with fictitious reasons.

26. The above said acts of defendant employer constituted a breach of implied contract which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

THIRD COUNT: BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING AGAINST DEFENDANT

27. The allegations of paragraphs 1 through 15, inclusive, are incorporated by reference.

28. The covenant of good faith and fair dealing requires that the employer can only discharge employee for good cause if an employee has an expectation of continuing employment. The causes for discharge in this case have been proven to be unwarranted and have no

basis in facts. Defendant employer who terminated plaintiff without good cause is liable for the tort of bad faith discharge.

29. The law of the State of California implied a covenant of good faith and fair dealing in the relationship between plaintiff and defendant employer. This covenant required that each party to the employment contract acts with fairness and good faith toward the other, and that neither party should take any action to prevent the other from receiving the benefits of the relationship.

30. The above said acts of defendant employer constituted a breach of covenant of good faith and fair dealing which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

FOURTH COUNT: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST DEFENDANTS

31. The allegations of paragraph [sic] 1 through 15, inclusive, are incorporated by reference.

32. Several incidents in Exhibit S4 where defendant employer, acting through defendants, deliberately and intentionally inflicted serious emotional distress against plaintiff. Defendant employer had approved the vacation and compensation time request and then falsely accused plaintiff of not obtaining permission. Defendant employer held weekly meetings with plaintiff in [sic] April 20, 1990 and May 4, 1990, and sent plaintiff to an offsite meeting in Roseville on April 27, 1990, and then falsely accused him of failing to attend the weekly meetings in those weeks. Defendant employer demanded

plaintiff to attend the CAD meeting on May 17, 1990 and gave him permission to present the CAD strategic marketing materials, and then falsely accused him of attending the meeting without permission and altering the agenda to force a personal presentation. Defendant employer instigated an argument with plaintiff on May 16, 1990 at the CICC show and on May 24, 1990 in a private meeting, and then falsely accused plaintiff of doing so. . . .

33. The above said acts of defendant employer constituted an intentional infliction of emotional distress against plaintiff which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

FIFTH COUNT: DEFAMATION AND CAREER DAMAGE AGAINST DEFENDANTS

34. The allegations of paragraphs 1 through 15, inclusive, and 32 are incorporated by reference.

35. Defendant employer falsely accused plaintiff of insubordination and unprofessional behavior, and then spread the rumors that greatly affected plaintiff's career at prospective employers when plaintiff was looking for a job and at his new company, according to the notice of other workers, information and belief of plaintiff.

36. Defendant deliberately committed to the above said acts with a clear intention to injure and defame the good name of plaintiff.

37. Plaintiff was forced to have a set back in his career to accept a lower position as a Junior Product

Marketing Engineer in the tactical marketing area instead of strategic marketing. Plaintiff was set back by around four years in his career path while any future promotion was questionable due to the defamation. Plaintiff has lost substantial benefits and future promotional opportunities that do not exist in his new job.

38. Plaintiff's inability to receive job satisfaction, which helped him in the past, has resulted in his feeling a total lack of sense of purpose and uncertainty in the new work environment.

39. The above said acts of defendant constituted a defamation of plaintiff which was a substantial factors [sic] in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

SIXTH COUNT: ANTITRUST VIOLATION AGAINST DEFENDANT

39. The allegations of paragraphs 1 through 15, inclusive, are incorporated by reference.

40. Defendant employer deliberately interfered with the COT business development to support COT customers in the US by obstructing the technical information transfer from NEC Corporate in Japan to NECEL in the US. Defendant employer hampered the formation of the COT technical support group in the US particularly at the domestic manufacturing facility in Roseville in order to restrict production and control prices. The Roseville production capacity is controlled by the availability of lead-frame, molding compound materials and special assembly equipments. Premium technologies requested

by COT customers are not available at the local manufacturing plan [sic] while the process technology information necessary for COT design are [sic] tightly controlled by NEC Tokyo.

41. Under Sherman Acts, unreasonable restraints of trade are illegal per se restraints interfering with free competition in business and commercial transactions which tend to restrict production, affect prices, or otherwise control market to detriment of purchasers.

42. Plaintiff was formally hired to set up the COT business support system and promote the COT business development activities. However, there was a conspiracy to secretly hamper the COT business development by defendant employer and hire plaintiff as a "scapegoat" to be responsible for the project without getting any support from employer ASIC management, particularly at the implementation stage of the business plan.

43. Defendant employer was surprised to receive the comprehensive COT Strategic Marketing Plan prepared by plaintiff after he had taken away the allocated marketing assistance time in capturing the presentation materials using the Macintosh. In addition, defendant was reluctant in allowing plaintiff to present and distribute the COT Strategic Marketing Plan materials to the Product Planning Committee on November 16, 1989.

44. The promise of having adequate engineering resource allocated to support COT business did not happen over the period plaintiff was employed by NEC Electronics Inc. Plaintiff believes that nobody was assigned to take over the COT strategic marketing position to carry out the COT business development plan

after plaintiff was discharged. The termination of employment of plaintiff appears to be an excuse to further hamper the COT business development and cover up the conspiracy since plaintiff requested an investigation of the unusual lack of support to promote the COT business from NECEL ASIC management.

45. The above said acts of defendant constituted a violation in antitrust law which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

WHEREFORE, plaintiff seeks judgment against defendants, and each of them, for all actual, consequential and incidental losses, including but not limited to loss of income and benefits, according to proof, together with prejudgment interest pursuant to Civil Code Section 3287 and/or 3288, and for general damages and punitive damages from all six counts, such other and further relief as the arbitrator deems proper.

Executed on February 7, 1991, in San Jose, California.

/s/ Peter P. Nghiem
PETER P. NGHIEM

In the Matter of an Arbitration between PETER NGHIEM, Complainant, and NEC ELECTRONICS, INC. Respondent. Re: AAA 74-30-0287-90	OPINION AND DECISION of JOHN KAGEL, ARBITRATOR November 18, 1991 San Francisco, CA

INTRODUCTION AND ISSUE:

This arbitration case is pursuant to NEC Electronics, Inc., "Policies Procedures Guidelines No. 4-304, subject: Problem Resolution." As a final step of this corporate problem resolution procedure, a matter which has been theretofore unresolved may be submitted to arbitration before a mutually selected impartial arbitrator. Employees may request arbitration of complaints related to termination of employment (NEC Exhibit L10034).

The Company maintains that the termination of Peter Nghiem is in accordance with his employment contract and, therefore, Nghiem should take nothing from these proceedings.

Nghiem's contentions are set forth in a complaint for damages Exhibit S-0 pages 1-121 under the following broad categories: wrongful termination, breach of implied contract, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress,

defamation and anti-trust (Tr. 6-7). A copy of that complaint is attached hereto and incorporated herein as Exhibit A.

AMERICAN ARBITRATION ASSOCIATION PROCEDURES:

Nghiem alleges violation of American Arbitration Association Rule 45, "Communication with Arbitrator" which provides there be no communication between the Parties and the neutral arbitrator other than at oral hearings and any other oral or written communications are to be directed to the AAA for transmittal to the arbitrator. Nghiem cited three letters from the Company dated October 18, 1990, November 20, 1990 and September 24, 1991 as violations of this rule.

The first two letters occurred prior to the retention by NEC and Nghiem of the AAA to administer the case. Prior to the AAA's handling of the case it was being administrated through the arbitrator's office. A letter dated November 27, 1990, specifies that date as the one on which the American Arbitration Association administration of the case began.

Neither the 1990 letters nor the letter of September 24, 1991 are substantive to the decision herein in any respect. Consequently, the fact that these letters were sent to the arbitrator directly, as opposed to through the AAA, are immaterial, of no consequence, and have played no part in the ruling in this case. Those letters are attached hereto and incorporated herein as Exhibit B.

EMPLOYMENT CONTRACT:

The Grievant's Employment, Invention and Confidential Information Agreement was signed by him on August 31, 1989. Paragraph 9 thereof reads:

> "9. I understand that nothing set forth in this agreement shall prevent or limit my right to terminate my employment at any time for any reason. And I understand further that nothing set forth herein shall prevent or limit the Company from terminating my employment at any time for any reason, unless I enter into a separate written employment agreement ("contract of employment"), signed by an officer of the Company, which sets forth specific terms regarding the period of my employment or termination of said employment." (NEC Ex. L10001, Nghiem Ex. S-1).

NOTICE OF TERMINATION:

By memo, dated June 11, 1990, from Grant Hulse, the Complainant's Supervisor, titled "Termination for Cause", the Grievant was terminated. That document is attached hereto and incorporated herein as Exhibit C.

DISCUSSION:

Complainant's Job:

Nghiem was hired as a Senior Product Marketing Engineer with a salary of approximately $57,000.00 per year (NEC Ex. L10005) on August 31, 1989. On September 1, 1989, Hulse summarized Nghiem's job responsibilities as follows:

> "Peter will have business development responsibilities for COT [Customer Owned Tools] business. After analyzing our capabilities in the competitive environment, he will drive the development of a cohesive business plan for the US market. He will coordinate the "start of business" action plans with each region's target.
>
> Peter will also have strategic marketing management responsibilities for all ASIC [applications specific integrated circuits] CAD [computer aided design] products and relationships. This includes vendor relationships and joint programs, marketing strategies, CAD sales tools, merchandising, competitive analysis, CAD analysis of target account, etcetera." (Nghiem Ex. 18).

These duties were subject to change in the future. Nghiem's business card identified him as "COT/CAD Product Manager" but that title did not "imply Management level fringe benefits" (NEC Ex. L10005).

Anti-Trust:

In his brief, Nghiem makes no argument with respect to his claimed violations of anti-trust law by NEC towards him. Accordingly, that claim is considered to be abandoned and will not be further discussed.

Standard to be Applied:

While NEC has contended that Nghiem's contract with it is an "at will" contract as paragraph 9 thereof suggests, NEC nonetheless maintains that it terminated Nghiem for cause (see termination letter). At the hearing

the Company stated it was willing to stand by the reasons given for Nghiem's termination and prove its case (Tr. 162). Accordingly, for the purposes of this case, the determination to be made is whether or not there was cause for the Complainant's termination.

Grounds for Termination:

It is unnecessary to detail all of the grounds for termination. There are three broad categories alleged: insubordination, unsatisfactory work performance, and unprofessional conduct. Major grounds for termination will be discussed below.

Insubordination: Failure to Meet Weekly:

One-on-one weekly meetings which were supposed to be on Fridays at 4:00 p.m. were mandated by Hulse in the Complainant's Performance Planning Evaluation and Review that he received dated March 26, 1990. That review is part of the Termination Notice attached hereto. The purpose of that meeting, as stated in NEC Exhibit L10022, was to improve communication between Nghiem and Hulse (Tr. 181-182). While Nghiem maintains that the schedule for these meetings were informal, that the meetings were not concerned totally with the question of communication or interpersonal relations, he did testify that that subject was occasionally talked about at several of them. Hulse's testimony is accepted that there were several instances where Nghiem did not do anything to either attend or reschedule such meetings. His failure to do so was insubordinate.

Insubordination: ACE Conference:

Of greater importance with respect to insubordination is the claim concerning the ACE (Advanced CAD Environment) meeting. That conference was an international meeting set for May 16, 1990. Hulse was assigned to set the agenda for that meeting. He scheduled a time slot for the Complainant to talk about a specific contract with another company, Cadence, which was important to the project being discussed and which Nghiem was negotiating. On May 8, 1990, Hulse gave a preliminary agenda to Nghiem and to ASIC managers. According to Hulse, Nghiem was critical of the agenda. He wished to give his own personal view of ACE in a separate presentation. He stated that he, rather than Hulse, should present the United States vision of what the ACE project was to be. Hulse advised Nghiem that he, not Nghiem, was to give that presentation.

Nghiem also stated that he felt that the Cadence contract negotiation subject been assigned was not worth the one and a half hour's [sic] scheduled for it, in that it would be boring if it was of such length. Hulse suggested that the Cadence negotiations then be included in the regular business items and it be discussed by Nghiem. At the end of the meeting, Nghiem still insisted that his own overall presentation should go forward, which Hulse again refused to allow. Nghiem then said he would get his ideas together and would present some customer CAD profiles. The two agreed that they would discuss the matters Nghiem would present at their regular 4:00 p.m. Friday, one-on-one meeting on May 11, according to Hulse.

On May 11, Hulse rewrote the ACE agenda removing Nghiem's one and a half hour presentation. Nghiem did not come to the 4:00 p.m. meeting but returned to the office close to 5:00 p.m. He stated that he had been tied up with CICC trade show matters which was due to start the next day in Boston. Hulse stated he needed to meet with Nghiem at that point because he had updated the ACE agenda. Nghiem stated he had no time and asked if he could get back to Hulse and discuss the matter at the CICC which Hulse stated would be all right. Hulse, however, was getting concerned so he checked with the person who does Macintosh presentations for meetings who stated that Nghiem had not yet given her anything but that he was due to fax her something to prepare for the ACE meeting (Tr. 196, NEC Ex. L10127).

In Boston the day before the ACE meeting, Hulse went to Nghiem and told Nghiem he wanted to sit down and talk about the ACE meeting. Hulse showed Nghiem the latest agenda with Nghiem's name no longer on it. Hulse described Nghiem's reaction as "very predictable, surprised, angry, shock." Nghiem began to write down the words that Hulse used (Tr. 198). Nghiem stated "Oh, this is great, we are investigating you. You are going to get canned. Keep talking. I write it all down." (Tr. 199).

Hulse told Nghiem that his superior, Hashimoto, had assigned him to chair the ACE meeting; that he had been given the project as a project leader and that Nghiem could not present his views without Hulse's permission. He did not want Nghiem to show up at the meeting with a different direction to embarrass him or his manager. Nghiem told him "You have a problem" (Tr. 199). Hulse testified he understood this to mean Hulse was using

Nghiem's work but was trying to take the glory for it. Nghiem suggested Hulse was under investigation by NEC Human Resources and he would soon be unemployed. Hulse told Nghiem he had a problem and that if Nghiem's behavior did not change he could not see Nghiem working there another month (See also NEC Ex. 10128-29).

Two hours later Hulse went back to reexplain the situation but Nghiem said he was too busy to talk with Hulse. Hulse told Nghiem he would make himself available the following morning in Mountain View and told Nghiem unless he came to see Hulse he did not want Nghiem to attend the ACE meeting. The reason why Hulse wanted to see Nghiem in advance of the meeting was to go over the material Nghiem was to present.

Hulse was in his Mountain View office at 5:30 a.m. and the ACE meeting began at 8:30. Nghiem did not come to see Hulse and he was not at the ACE meeting when it started. At 10:15 he entered the room after earlier having the Macintosh operator put together a presentation for him. Shortly before noon when the meeting session was just about to close to move to the business session, Nghiem raised his hand and stated that he needed to give a presentation, that he had some important things that had to be discussed. To avoid embarrassment, Hulse asked the attendees if that was all right with them. They all agreed to hear Nghiem's presentation as long as it was made during lunch, which it was. The Complainant presented his ideas about the marketplace. In Hulse's view it added nothing relevant to the meeting, but it did not embarrass anyone either (Tr. 204). What was presented had little to do with Nghiem's original assignment (Tr.

543, 545-546). Both Hulse and Hitashi Yoshizawa testified that Nghiem's presentation was professionally done.

Nghiem presented no substantial evidence to contradict Hulse's testimony.

Nghiem did not present Hulse with any material as was reasonably requested by Hulse who was chairing the meeting, he in effect, threatened Hulse with respect to taking him before the Human Resources division of the Company for some form of unspecified misconduct when Hulse was attempting to reasonably carry out his duties, and he appeared at, interrupted and made a presentation before the meeting when he was specifically told he was not to do so because he would not disclose what he planned to present. His actions were a clear and utter disregard of Hulse's authority and was clearly insubordinate. His actions were a willful breach of his employment obligations as a professional employee. Nghiem's contentions in his brief, that he, in fact, presented what he was going to discuss at the ACE meeting to Hulse as early as May 4, neither establishes that he had (See Nghiem Ex. 21B), nor that it met Hulse's proper needs with respect to information about what Nghiem was to do at the meeting. The fact that Hulse may have seen material which could have been presented, but which he did not know would be presented at some point in the past, did not meet the Complainant's ACE meeting obligation. Hulse's testimony is credible, contrary to Nghiem' [sic] contention. The fact that Hulse or others did not act embarrassed because of Nghiem's asking to make a presentation, which he had never been invited to give, does not excuse his conduct. Similarly, that he gave his presentation in a professional manner also does not do

so. The fact was he was not supposed to come to the meeting at all. He did, and then he compounded his misconduct by making a presentation that he had not cleared in advance with Hulse. Nghiem maintains that the change of agenda, Hulse's initiation of conversation on the CICC floor, and the sending out of a new agenda Nghiem had not seen reveals Hulse's motive and rationale. Yet, as Nghiem suggests, such questions "should not be confused with the acknowledged right of Management to conduct their business and make decisions" (Nghiem Brief, p. 21). Hulse, in fact, was conducting the Company's business and was making appropriate decisions. Nghiem acted contrary to that conduct of business and in doing so was clearly insubordinate as alleged.

Insubordination: May 24 Warning:

Hulse also established that the Complainant walked out of a meeting on May 24, 1990, which led to the Complaint's written warning when Hulse directed that he [sic] not to do so. Nghiem presented no substantive defense to that testimony.

Similarly, the May 24 action of walking out of a meeting with Hulse when Hulse ordered him not to do so was also insubordinate.

Unprofessional Conduct: Characterization of Hulse:

With respect to the unprofessional conduct about which the Complainant was accused, it was essentially uncontradicted that at a meeting called by Human Resources as a "resolution meeting" on May 31, 1990, Hulse and Nghiem were invited to each state their views.

Nghiem attacked Hulse's integrity, professionalism, and called him a liar (Tr. 90-91). After being cautioned concerning his conduct, Nghiem, after a period of time, again raised his voice and accused Hulse of having less than ethical standards.

Nghiem did not deny that he used such language. Rather he characterized the meeting as being intentionally inflammatory so that he would react in the way that he did (Brief p. 37). The testimony does not show that the conduct of the meeting was such that would provoke the name-calling by Nghiem. In fact, in a written memo to Human Resources dated May 9, 1990, Nghiem had already accused Hulse of "dishonest actions." He pointed out that Hulse, as a manager, contrary to what Nghiem believed was occurring, must be an "ethical example" for others (Nghiem Exs. 17C, 17D). Therefore his choice of words on May 31, 1990 were hardly originally incited at the meeting by Hulse or others. The Complainant was given an opportunity to state that which he wished to state and was invited to remain on the issues which were being discussed. The purpose of the meeting was to reconcile the parties and resolve their problems, as opposed to creating greater confrontation. Accordingly, Nghiem's unprofessional conduct on that date was established.

Unsatisfactory Work Performance:

With respect to unsatisfactory work performance, in his performance appraisals Nghiem's ratings were high in many respects but low in others. With respect to CAD vendor relationships Nghiem specifically contested that

his 2.5 rating appraisal was not appropriate. Yet, that there was a need for the Complainant to improve his communication problems was established in this record. Particularly they were established with respect to communications between Hulse and Nghiem after Hulse was critical of Nghiem in some aspects of his job in the performance appraisal. There was no recognition by Nghiem of the high ratings that he received except that he felt that he was being ranked too high. Nghiem was aware that at least one Employee, Moises Hernandez, had felt that there were difficulties with respect to communication. Hulse had received complaints from others as well. On receiving the performance appraisal, rather than using the opportunity to respond in a constructive way or to file appropriate rebuttals if necessary, with respect to the CAD vendor issue, which he felt was misrepresented, Nghiem conducted himself in a particularly negative fashion. Nghiem's memo in response to his appraisal to Human Resources was short on specifics but long on Nghiem's general views of Hulse's managerial shortcomings (Nghiem Ex. 17A-F). As Hulse pointed out, it was from the time of the performance appraisal onwards that the relationship between Nghiem and Hulse deteriorated, resulting in the kinds of conduct already described above.

Conclusions as to Charges:

The conclusion from the foregoing necessarily is that there was ample evidence of just cause for the termination of the Complainant. Nghiem had been warned about his misconduct, yet he persisted in it. As stated in the written warning (NEC Ex. L10026) in describing walking

out of the meeting when items critical to Nghiem were being discussed, even after being told he would be written up formally if he did so, Hulse wrote, "The real problem is Issue 3. The general insubordination on top of the lack of communication. If this type of behavior continues, I will recommend to ASIC Management and Human Resources that further action be taken which may include termination of employment with NEC." Nghiem did continue such actions on May 31. His termination was for cause. For the reasons stated above the evidence sustains the serious incidents cited with respect to his termination.

DEFENSES:

The Claimant's major defense is that he was a highly successful employee of the Company, and was so successful that others, including Hulse, sought to discredit and then terminate him so that they could receive the credit and glory that the Complainant, rather than they, achieved. The Complainant dwelt on this defense to the virtual exclusion of any defense of many of the actions that he was specifically accused of. He justified his approach on the basis that he was being set up; that his areas of assignment, particularly COT, were specifically denied support even after Japan had enthusiastically endorsed them; that Hulse deliberately refused to communicate changes in job and work assignments with him; that, therefore, the Management both created incidents to provoke the Claimant or cited matters which were simply pretenses to terminate him. As stated in Nghiem's brief, "It is of course recognized that Management can easily

assert that this is nothing more than Nghiem's overinflated feeling of self-importance. It must also be recognized, however, that like fraud and discrimination, it is rare that proof comes from direct evidence. Instead, all the circumstances must be reviewed and from that, conclusions drawn.[13]" Footnote 13 reads: "It is for this reason that Nghiem felt it so important to tell his entire story at the arbitration and not simply address the 'incidents' as the Company had wanted" (Nghiem Brief, p. 9).

Nghiem, in fact, told his entire story at the arbitration, but that "story", which has been fully studied and carefully considered herein, did not establish what Nghiem claims that it circumstantially did. What is left out is the fact that Nghiem acted as he in fact did as described above, which he did not, in any material way, even deny. There is simply no showing why the Company would want to get rid of an acknowledged productive Employee unless there was some objective and overriding reason to do so. That the Company considered the Complainant a productive Employee in terms of his technical skills and efforts was shown by his performance appraisal.

The claim that others were trying to steal Nghiem's glory such as his negotiating the Cadence contract is belied by Hulse's offering Nghiem an hour and a half at the world-wide ACE meeting to describe what Nghiem was doing. Rather, what the Company sought to do was to improve the Complainant's shortcomings as it believed them to be. If they were not true, as the Complainant contends, he had internal processes to follow in addition to good work performance. The evidence did not establish that Hulse was a supervisor who had any reputation

for vengeance or dishonesty, let alone any specific examples thereof except as alleged but not proved by Nghiem. The record outside of the Complainant's own assertions, provides no factual basis that the Company's charges were mere pretense or that the Complainant was provoked by the Company to provide grounds for the Company to fire him. And, Nghiem's defenses, falling short as they do, establish no basis to find any fraud, any intentional infliction of emotional distress, any defamation or any of the other claims made by Nghiem.

Nghiem contends that *per se*, he could not have accomplished all that he did unless he got along with others as a "team player." Yet, as noted in the testimony, as a better team member, according to the Company, more could be accomplished easier; that simply because there was a problem didn't completely "break" the team. More would be accomplished if Nghiem was perceived as less pushy and more considerate of others' ideas (Tr. 803).

Nghiem also contends that his job appraisals at Toshiba, where he was employed shortly after leaving NEC, shows that NEC's appraisal was skewed. That contention does not follow given the evidence of what occurred at NEC.

DISCRIMINATION:

Further, the record does not establish any discrimination against Nghiem because he is a Vietnamese American. Nghiem did not testify that there was any overt discriminatory incident. He is but one of many non-white Americans who worked at NEC at the time that he did. Nor did the evidence circumstantially establish that there

was any national origin discrimination that resulted in his termination by the Company, or was utilized by the Company in any form toward Nghiem.

DECISION:

Peter Nghiem was terminated by NEC Electronics for just cause. He is not entitled to any damages.

/s/ John Kagel
Arbitrator

No. 92-16155

In The United States Court of Appeals
for the Ninth Circuit

PETER P. NGHIEM, PLAINTIFF AND APPELLANT

v.

NEC ELECTRONICS, INC., a California corporation;
NEC CORPORATION (TOKYO);
JAPAN (NIPPON ELECTRIC COMPANY),
a Japanese corporation;

HIRO HASIMOTO, DR. H. YOSHIZAWA,
GRANT HULSE and DOES 1-100 Inclusive,
DEFENDANTS AND APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA BEFORE THE HONORABLE RONALD M. WHYTE

BRIEF OF DEFENDANT-APPELLEE NEC ELECTRONICS INC.

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TABLE OF CONTENTS

		PAGE
I	STATEMENT OF JURISDICTION (CIRCUIT RULE 28-2.21)	1
II	STATEMENT OF ISSUE PRESENTED FOR REVIEW	1
III	STATEMENT OF CASE	2
	A. Nature Of The Case And Disposition In District Court	2
	B. Statement Of Facts	2
IV	ARGUMENT	5
	A. Standard Of Review Of Confirmation Of Arbitration Award	5
	B. The District Court Properly Confirmed The Arbitration Award Pursuant To The Federal Arbitration Act	6
	1. Federal Law Favors Arbitration	6
	2. Appellant's Dispute Was Arbitrated Pursuant To The Federal Arbitration Act	7
	3. The Requirements Of The Federal Arbitration Act Have Been Satisfied	8
	C. Arbitration Pursuant To The Federal Arbitration Act Is Appropriate For The Resolution Of Disputes Arising From Alleged Violations Of Title VII	12

D. Antitrust Claims Are Proper Subjects Of Arbitration Pursuant To The Federal Arbitration Act 15

E. Regardless Of Whether The District Court Erred In Confirming The Arbitration Award, The Order Of The District Court Should Be Affirmed Because The Law, As Correctly Applied, Requires The Same Result 20

1. Regardless Of Confirmation of the Arbitration Award, The District Court Could Have Dismissed Appellant's Complaint For Failure To State A Claim Is Barred By Res Judicata And/Or Collateral Estoppel Arising From The Arbitration Award..... 22

2. The District Court Could Have Dismissed The Appellant's Action On A Summary Judgment Basis Because Of The Res Judicata Effect Of The Arbitration Award Regardless Of Its Confirmation..... 25

V STATEMENT OF RELATED CASES..... 28

VI CONCLUSION..... 29

TABLE OF AUTHORITIES

PAGE(S)

CASES

Albin Stevedore Co. v. Central Rigging & Contracting Corp., 308 F.2d 347 (9th Cir. 1962) 24

Alexander v. Gardner-Denver Co, 415 U.S. 36, 94 S. Ct. 1011 (1974) 13, 14

Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) 14

American Fed. of Television & Radio Artists v. WCCO, 934 F.2d 987 (8th Cir. 1991) 22, 26

American Postal Workers Union v. United States Postal Service, 823 F.2d 466 (11th Cir. 1987) 7

American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) 16-18

ATSA of Calif., Inc. v. Continental Ins. Co. 702 F.2d 172 (9th Cir. 1983) 28

Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) 13

Cofrancesco v. City of Wilmington, 419 F. Supp. 109 (D.C. Del. 1976) 6

Dalow Industries, Inc. v. Jordache Enterprises, Inc., 631 F. Supp. 774, 778 (S.D.N.Y. 1985) 24

DeHorney v. Bank of America Nat'l. Trust & Sav. Assn. 879 F.2d 459 (9th Cir. 1989) 25

Donahue v. Windsor Locks Bd. of Fire Com'rs. 834 F.2d 54 (2nd Cir. 1987) 25

Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 35 Cal. 3d 312 (1983) 7

Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S. Ct. 1647 (1991) 6, 7, 12-15

Hall v. Nomura Securities, International, 219 Cal. App. 3d 43 (1990) 7

Hybert v. Shearson Lehman/American Exp., Inc. 688 F. Supp. 320 (N.D. Ill. 1988) 26, 27

In re Public Service Co. of New Hampshire, 879 F.2d 987 (1st Cir. 1989) 21

Ivery v. United States, 686 F.2d 410 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1428 (1983)..... 24

Jarrell v. Wilson Warehouse Co. 490 F. Supp. 412 (M.D. LA. 1980)..... 28

K-2 Ski Company v. Head Ski Co., Inc., 506 F.2d 471 (9th Cir. 1974)..... 19

Keniston v. Roberts, 717 F.2d 1295 (9th Cir. 1983)..... 21

Kern v. Levolor Lorentzen, Inc., 889 F.2d 772 (9th Cir. 1990)..... 11

Kerr v. Rose, 216 Cal. App. 3d 1551 (1990)..... 11

Lehto v. Underground Constr. Co. 69 Cal. App. 3d 933 (1977)..... 26

Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (1992)..... 7, 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985).. 6, 7, 16-18

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927 (1983)..... 7

OSC Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd.*, 792 F.2d 1464 (9th Cir. 1986)..... 25

Piggly-Wiggly Operators Warehouse, Inc. v. Piggly-Wiggly Operators Warehouse Independent Truck Drivers Union, 611 F.2d 580 (5th Cir. 1980)..... 12, 28

Plaine v. McCabe, 797 F.2d 713 (9th Cir. 1986)..... 21

Pugol v. Shearson/American Exp., Inc. 829 F.2d 1201, appeal after remand, 877 F.2d 132 (1st Cir. 1987)..... 26

Raiford v. Merrill, Lynch, Pierce, Fenner & Smith, 903 F.2d 1410 (11th Cir. 1990)..... 1, 5

Riley Co. v. Commissioner, 311 U.S. 55, 61 S. Ct. 95 (1940) 21

Roe v. Kidder Peabody & Co., 52 Fair Empl. Prac. Cas. 1865 (S.D.N.Y. 1990) 15

Rowland v. Painewebber, Inc., 4 Cal. App. 4th 279 (1992) 7

Spellman v. Securities, Annuities & Insurance Services, Inc., 8 Cal. App. 4th 452 (1992) 7, 15

Thibodeau v. Crum, 4 Cal. App. 4th 749 (1992) 25, 26

Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991).....5, 6, 19, 20

United Steel Workers v. American Manufacturing Co., 371 U.S. 195, 80 S. Ct. 1343 (1960) 6

United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358 (1960)..... 6

United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347 (1960)..... 6

Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337, 1339 (8th Cir. 1989) 23

Wellons, Inc. v. T.E. Ibberson Co., 869 F.2d 1166, 1168 (8th Cir. 1989).....22, 25, 26

Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991)..... 13

STATUTES

Civil Rights Act of 1964

title VII 7, 12-15

Fair Employment and Housing Act

Government Code section 12900 *et seq*..... 15

Federal Arbitration Act

9 U.S.C. section 1, *et seq.* 7-10, 12, 15, 20, 26

9 U.S.C. section 2 8

United States Code

28 U.S.C. section 1291 1

28 U.S.C. section 1331 1

42 U.S.C. section 2000e-5(f)(3) 1

OTHER AUTHORITIES

Federal Rules of Appellate Procedure

Rule 4 1

Rule 39 29

Federal Rules of Civil Procedure

Rule 56 20

I

STATEMENT OF JURISDICTION (CIRCUIT RULE 28-2.21)

The United States District Court for the Northern District of California had jurisdiction over this matter pursuant to 42 U.S.C. section 2000e-5(f)(3) and 28 U.S.C. section 1331.

The District Court's order granting Appellee NECEL's motion for confirmation of the arbitration award and dismissing Appellant's Complaint is a final order since no issues remain undecided. The United States Court of Appeal for the Ninth Circuit has jurisdiction over this appeal under 28 U.S.C. section 1291.

The date of entry of judgment of the order herein appealed was June 9, 1992. The notice of appeal was filed June 16, 1992. This appeal was timely filed under Federal Rule of Appellate Procedure 4. On appeal, this court will review the District Court's order confirming the arbitration award under an abuse of discretion standard. *Raiford v. Merrill, Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1413 (11th Cir. 1990).

II

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue before this Court is whether the District Court properly granted Defendant-Appellees' motion for confirmation of the arbitration award, thereby dismissing Plaintiff-Appellant's claims.

III

STATEMENT OF CASE

A. Nature Of The Case And Disposition in District Court.

This is an appeal from a motion for confirmation of an arbitration award granted in favor of Defendant-Appellee NEC Electronics Inc. ("NECEL") and against Plaintiff-Appellant Peter P. Nghiem ("Appellant"). Appellant was employed by NECEL from 1989 until his termination in June of 1990. Pursuant to NECEL's written "Problem Resolution Process," Appellant instituted a complaint thereunder seeking relief as a result of his termination from employment at NECEL.

As a result of this process, an arbitration hearing was held. On November 19, 1991, the Arbitrator issued a decision denying Appellant his requested relief. While this was pending, Appellant initiated a civil action in Santa Clara County Superior Court. Service in the state court action was made on NECEL subsequent to the issuance of the arbitration award. Therefore, on March 6, 1992, NECEL removed the case to the U. S. District Court for the Northern District of California. On June 9, 1992, Judge Ronald M. Whyte of the District Court granted NECEL's motion for confirmation of the arbitration award, and dismissed Appellant's Complaint in its entirety. The instant appeal followed.

B. Statement Of Facts.

Appellant Peter Nghiem was employed by Appellee NECEL from 1989 until his termination in June of 1990. (*See*, District Court's Order Granting Defendant's Motion For Confirmation Of The Arbitration Award And Dismissal Of Action (hereinafter referred to as "District Court Order") at p. 1; *see also*, Defendant's Separate Statement of Undisputed Fact No. 1 (hereinafter referred to as "Undisputed Material Fact No. ___," referring to the numbered paragraphs therein) at SER C, p. 56.)[1] NECEL maintained a "Problem Resolution Process" for "disputes, problems, complaints or claims" raised by employees arising out of their own or the company's conduct or the

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[1] Appellees are designating Appellees' Supplemental Excerpts of Records as "SER." Exhibits attached to documents in the record will be referenced as "Exh.," page number designated as "p."

employment relationship, including its termination. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 3 at SER C, p. 57). NECEL's problem resolution process concludes in its "Step 4" with "final and legally binding" arbitration according to its express terms. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 4 at SER C, p. 58).

Pursuant to this process, Appellant instituted a complaint seeking relief as a result of his termination from employment at NECEL. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 5 at SER C, p. 58). As a result of Appellant following the problem resolution process through its four steps into arbitration, an arbitration hearing was held before Arbitrator John Kagel in a proceeding before the American Arbitration Association. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 6 at SER C, p. 58). Appellant presented evidence and arguments on his behalf at the arbitration hearing, and submitted a "Closing Brief" of 50 pages detailing his position to the Arbitrator. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 7 at SER C, p. 58).

The Arbitrator then issued a decision dated November 18, 1991, denying Appellant all his requested relief. (*See*, District Court's Order at pp. 2-3; Undisputed Material Fact No. 8 at SER C, p. 58). According to the Arbitrator, and as expressly set forth in Appellant's arbitration complaint, that complaint raised the following broad categories of claims: "wrongful termination, breach of implied contract, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress, defamation and anti-trust . . . " (*See*, Undisputed Material Fact No. 9 at SER C, pp. 58-59). The Arbitrator also

addressed and ruled against fraudulent misrepresentation and race discrimination allegations and evidence raised by Appellant. (*See*, Undisputed Material Fact No. 9 at SER C, pp. 58-59). These are the same essential claims raised by Appellant in his First Amended Complaint at issue herein, and also in his original Complaint initiating his state court action filed prior to the arbitration decision in June of 1991. (*See*, First Amended Complaint).

IV

ARGUMENT

A. Standard Of Review Of Confirmation Of Arbitration Award.

The issue for review by this Court is whether the District Court properly granted NECEL's motion for confirmation of the arbitration award. The standard of review to be applied to the District Court's decision is an abuse of discretion standard. The Appellate Court must first determine, however, whether the arbitration award itself was arbitrary and capricious. The Court must then consider whether the District Court abused its discretion in confirming that award. *Raiford, supra*, 903 F.2d at 1413. Thus, Appellant must satisfy a dual burden. He must convince this Court that the Arbitrator's award was arbitrary and capricious, and must then also demonstrate that the District Court abused its discretion in reviewing and confirming the award.

It is the law of this Circuit "that an arbitration award will not be set aside unless it evidences a 'manifest disregard for law.' " *Todd Shipyards Corp. v. Cunard Line, Ltd.*,

943 F.2d 1056 (9th Cir. 1991). Moreover, the Appellate Court will review the arbitration award

> mindful that confirmation is required even in the face of 'erroneous . . . misinterpretations of law.' . . . It is not even enough that the Panel may have failed to understand or apply the law. . . . An arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of law.'

Id. at 1060.

Thus, if the arbitration award is "within the submission, and contains the fair and honest decision of the arbitrators, after a full and fair hearing of the parties," a district court's confirmation of the award must be affirmed by an appellate court. *Id.* As set forth below, the arbitration award in the instant appeal met this standard, and was thus properly confirmed by the District Court.

B. The District Court Properly Confirmed The Arbitration Award Pursuant To The Federal Arbitration Act.

1. Federal Law Favors Arbitration.

Federal law has long favored arbitration and enforcement of arbitration awards. *United Steel Workers v. American Manufacturing Co.*, 371 U.S. 195, 80 S. Ct. 1343 (1960); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347 (1960); *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358 (1960). This body of law counsels that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Mitsubishi Motors*

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985).

Under federal law, the issuance of an arbitration award generally bars any subsequent court action on the merits of the original claim. *See, Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991); *Cofrancesco v. City of Wilmington*, 419 F. Supp. 109 (D.C. Del. 1976). Indeed, as a result of this strong federal policy, arbitration has recently been held to be an appropriate forum for settling statutory disputes such as age discrimination, *Gilmer, supra,* and Title VII sex discrimination claims, *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (1992).

Moreover, California also maintains a strong policy favoring arbitration as an efficient and inexpensive method of dispute resolution. *See, e.g., Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 322 (1983). California courts have enforced arbitration agreements and awards in age discrimination claims, *Hall v. Nomura Securities, International*, 219 Cal. App. 3d 43 (1990), and race discrimination claims, *Spellman v. Securities, Annuities & Insurance Services, Inc.*, 8 Cal. App. 4th 452 (1992). Both federal and state law are clear that the arbitration agreements are to be liberally construed in favor of arbitration. *Mitsubishi Motors, supra; Rowland v. Painewebber, Inc.*, 4 Cal. App. 4th 279 (1992).

2. Appellant's Dispute Was Arbitrated Pursuant To The Federal Arbitration Act.

The Federal Arbitration Act ("Act" or "FAA") expresses a "liberal policy favoring arbitration agreements. . . . " *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). The Act applies to the resolution of disputes arising out of maritime transactions or "contracts involving commerce." 9 U.S.C. § 1, *et seq.* The Act specifically excludes from its coverage contracts of employment for workers *directly* involved in international or interstate commerce. 9 U.S.C. § 1. *Cf., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 473 (11th Cir. 1987) (limiting any exclusion to employment contracts subject to this Act to those involving workers actually engaged in interstate or foreign commerce).

With respect to the scope of the Federal Arbitration Act, section 2 of the Act provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, *or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract*, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). In the instant appeal, Appellant Nghiem was in a position and industry such

that his arbitration agreement and award can be enforced under the Act.

3. The Requirements Of The Federal Arbitration Act Have Been Satisfied.

As noted above, the Federal Arbitration Act requires *either* a written provision in a contract, *or* "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract. . . . " 9 U.S.C. § 2. Thus, while Appellant correctly argues that the original employment contract which he signed did not contain an arbitration clause, his reliance on this fact is misplaced. Appellant fails to either acknowledge or dispel the significance of his letter to NECEL's Director of Human Resources requesting arbitration.

A review of the events leading up to the arbitration which Appellant now challenges clearly indicates that arbitration of Appellant's dispute was proper pursuant to the Federal Arbitration Act. On September 5, 1989, shortly after he began his employment with NECEL, Appellant signed a Receipt which provides as follows:

> I, have read Denny Mitchell's letter of introduction and acknowledge receipt of the NECEL handbook. I will read it as soon as possible. If I have questions concerning the handbook I will consult with Human Resources.

(Exhibit "H" in Appellant's Excerpts of Records).

Upon his termination on June 11, 1990, Appellant initiated NECEL's four-step problem resolution process, which is discussed in detail in the employee handbook

referenced by Appellant in the Receipt. Appellant unsuccessfully completed the first three steps of the process, which include notification of the employee's supervisor, filing a complaint with a company vice-president, and a formal review by the Personnel Committee. (Exhibit "I" in Appellant's Excerpts of Records). On September 10, 1990, Appellant was denied relief following Step 3 of the problem resolution process.

The process culminates in Step 4, which is addressed in detail at Page 5-3 of the employee handbook. (Exhibit "I" in Appellant's Excerpts of Records). With respect to Step 4, the handbook provides that: "If you desire to pursue your Complaint further, the Complaint must be submitted to an impartial arbitrator or it is waived." (Exhibit "I" in Appellant's Excerpts of Records). The handbook continues that: "The decision of the arbitrator will be final and legally binding *on the company and the employee* to the full extent permitted by law." *Id.* (Emphasis added).

Consequently, on September 21, 1990, Appellant wrote a letter to Denny Mitchell, NECEL's Director of Human Resources, which was captioned, "Request for Arbitration in Step 4 of NECEL's Complaint Procedure." (Exhibit "G" in Appellant's Excerpts of Records). The first paragraph of that letter states that: "I [Nghiem] would like to pursue to the Step 4 of NECEL's Complaint Procedure since I am not satisfied with the decision of the Executive Personnel Comittee (sic) in response to my appeal in Step 3." *Id.* In the closing paragraph of the letter, Appellant requests that NECEL "please provide me the information on arbitration process in Step 4 of

NECEL's Complaint Procedure and let me know what need [sic] to be done to prepare for the arbitration." *Id.*

This written request for arbitration was signed by Appellant Nghiem. As Judge Whyte noted in his Order confirming the arbitration award, Appellant "did expressly agree to arbitrate when he elected *in writing* to proceed with the NECEL resolution process and, in particular, requested to proceed to step four (4) of that process, binding arbitration." (Exhibit "A" in Appellant's Excerpts of Records, p. 3). (Emphasis in original). Thus, the requirement of the Federal Arbitration Act that there be a written agreement to arbitrate a dispute arising from a contract has been satisfied.

Moreover, Appellant's contention that there was no "express" agreement to arbitrate ignores Appellant's own verified pleading contained in his First Amended Complaint. In that pleading, Appellant makes sworn statements that he relied upon the binding arbitration policy of NECEL as part of his basis for claiming that he had an employment contract providing for termination only for good cause. (See, First Amended Complaint, paras. 4 and 4(c) at pages 4 and 6 thereof.)

The existence and application of this binding arbitration procedure to Appellant's claims are completely undisputed. Under California law, such policy manual provisions are specifically enforceable as contracts in themselves. *See, Kerr v. Rose*, 216 Cal. App. 3d 1551 (1990) (finding a cause of action for breach of an employment contract based on an allegation that the employer had failed to follow a written layoff policy); *Kern v. Levolor Lorentzen, Inc.*, 889 F.2d 772 (9th Cir. 1990) (affirming a

jury verdict in favor of an employee claiming breach of an implied-in-fact employment agreement not to be wrongfully laid off based on an employee handbook seniority policy).

The District Court further correctly noted in its Order that Appellant "voluntarily participated in the arbitration without ever objecting to the process and/or indicating that he believed the process would be non-binding." (Exhibit "A" of Appellant's Excerpts of Record, p. 3). It is axiomatic that, regardless of whether a party may have refused to arbitrate an issue, when the party proceeds to arbitration, it no longer has the right to raise the issue that its claims should not have been subject to arbitration. *See, Piggly-Wiggly Operators Warehouse, Inc. v. Piggly-Wiggly Operators Warehouse Independent Truck Drivers Union*, 611 F.2d 580 (5th Cir. 1980).

The requirements of the Federal Arbitration Act have been satisfied, and the arbitration award was not arbitrary and capricious. Further, it is clear that the District Court did not abuse its discretion in confirming the award. Accordingly, the District Court's Order confirming the arbitration award and dismissing Appellant's claims should be affirmed.

C. Arbitration Pursuant To The Federal Arbitration Act Is Appropriate For The Resolution Of Disputes Arising From Alleged Violations Of Title VII.

In support of his assertion that the District Court improperly confirmed the arbitration award, Appellant contends that disputes arising out of Title VII protections

are not subject to arbitration. Appellant's entire argument regarding the inappropriateness of arbitration in this context, however, has been displaced by the recent decision of the United States Supreme Court in *Gilmer v. Interstate/ Johnson Lane, Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991), and the line of cases following it.

As noted by the Eleventh Circuit Court of Appeals in the most recent of these cases, "it is clear that Title VII discrimination claims are subject to compulsory arbitration." *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992). Indeed, the Ninth Circuit itself has recently upheld an employer's right to arbitrate a Title VII claim, noting that the plaintiff failed to meet "her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act." *Mago v. Shearson Lehman Hutton, Inc., supra,* at 935.

Appellant has neither considered nor addressed this controlling line of cases, and has based his argument on the United States Supreme Court's decision in *Alexander v. Gardner-Denver Co*, 415 U.S. 36, 94 S. Ct. 1011 (1974). In *Gilmer*, however, "the Supreme Court rejected the argument that the *Alexander* line of cases illustrates Congress' intent to preclude arbitration in a commercial contract setting." *Mago, supra,* 956 F.2d at 935. Moreover, the Sixth Circuit Court of Appeals has stated that, "we find reliance on *Alexander* in this context to be foreclosed." *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991).

In *Alexander*, the Supreme Court considered whether a union employee was precluded from pursuing an action under Title VII after he had been unsuccessful in an

arbitration compelled by his collective bargaining agreement. In deciding that the employee was not so precluded, the Court analyzed the purposes and enforcement scheme embodied in Title VII. Although "the Supreme Court does not overrule *Alexander* in *Gilmer*, it does reject a reading of *Alexander* as prohibiting the arbitration of employment discrimination claims." *Id.*

Specifically, in response to the arguments based upon *Alexander*, the Court in *Gilmer* states:

> There are several important distinctions between the *[Alexander v.] Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involve the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate the statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably were held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants were represented by their unions in the arbitration proceedings. An important concern, therefore, was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which as discussed above, reflects a "liberal federal policy favoring arbitration agreements." [Citation omitted.] Therefore, those cases provide no basis for refusing to enforce

> Gilmer's agreement to arbitrate his ADEA claim.

Gilmer, supra, 111 S. Ct. at 1657.

This "rejection of *Alexander* is especially forceful because the stockbroker-employee in *Gilmer* 'vigorously asserte[d]" that *Alexander* "preclude[d] arbitration of employment discrimination claims.' " *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (holding that Title VII sex discrimination claims can be properly subjected to compulsory arbitration).

California courts have also held that statutory discrimination claims are subject to arbitration. Most recently, the California Court of Appeal required compulsory arbitration of a race discrimination claim based on the California Fair Employment and Housing Act ("FEHA"). *Spellman v. Securities, Annuities & Insurance Services, Inc., supra.* In *Spellman,* the court dismissed the argument that claims of race discrimination are of greater concern under the Constitution than the age claim raised in *Gilmer. Id.* at 463. *See, also, Roe v. Kidder Peabody & Co.,* 52 Fair Empl. Prac. Cas. 1865 (S.D.N.Y. 1990) (compelling arbitration of Title VII race discrimination claim pursuant to Federal Arbitration Act).

It has become readily apparent, in the wake of *Gilmer* and its progeny, that discrimination claims arising pursuant to Title VII can be the subject of compulsory arbitration under the Federal Arbitration Act. Appellant's reliance on the line of cases predating *Gilmer* is misplaced, and his entire argument is without merit. The District Court's Order confirming the arbitration award should be affirmed.

D. Antitrust Claims Are Proper Subjects Of Arbitration Pursuant To The Federal Arbitration Act.

As his final argument that the District Court erred in confirming the arbitration award, Appellant asserts that "[a]greements to arbitrate federal antitrust issues are not enforceable." Brief of Appellant-Plaintiff, p. 26. This assertion is simply incorrect. Appellant bases his entire argument on the holding of the Second Circuit Court of Appeals in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) and cases predating that decision. Appellant claims that the *American Safety* holding is "uniformly adopted by the Courts of Appeals." Brief of Appellant-Plaintiff, p. 26.

However, following the United States Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985), the validity of the *American Safety* case is questionable, at best. In *Mitsubishi*, the Supreme Court announced its "skepticism of certain aspects of the *American Safety* doctrine," and refused to accept its holding that antitrust claims are not suited for arbitration. *Id.* at 3356. In so doing, the Court engaged in a detailed analysis of the policies and rationale which guided the Second Circuit in reaching its conclusion. The Court concluded that the concerns expressed in *American Safety* were no longer valid. *Id.*

In undertaking this careful analysis, the Court noted that:

> At the outset, we confess to some skepticism of certain aspects of the *American Safety* doctrine. . . . [T]he doctrine comprises four

> ingredients. First, private parties play a pivotal role in aiding governmental enforcement of the anti-trust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate anti-trust disputes may be contracts of adhesion militates against automatic forum determinations by contract." Third, antitrust issues, prone to complications, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, . . . " decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values." *See, American Safety*, 391 F.2d. at 826-827.

Id. at 3356.

The Court addressed the first concern, which it termed "the core of the *American Safety* doctrine," in great detail, and acknowledged the "fundamental importance to American democratic capitalism of the regime of the antitrust laws." *Id.* The Court concluded that "the importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court." *Id.* The Court reasoned that there is no basis for assuming that arbitration will not provide an adequate mechanism, and pointed out that "the courts of the United States will have the opportunity at the award-

enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 3359. (*See*, generally, the Court's discussion at pp. 3358-3361).

The *Mitsubishi* Court also found the second *American Safety* concern to be unjustified. The "mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id.* at 3357. The Court noted that, absent a showing that would warrant setting aside the forum selection clause, such as fraud or undue influence, "there is no basis for assuming the forum inadequate or its selection unfair." *Id.*

The Court also easily dismissed the third *American Safety* concern. The Court instead expressly emphasized that adaptability and access to expertise are hallmarks of arbitration. The Court explained that the "anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Id.* Moreover, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to arbitrate their disputes." *Id.* The Court summarized that "the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter." *Id.*

The Court also rejected the final *American Safety* concern that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. The Court "decline[d] to

indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.* at 3357-3358.

Thus, the precedential significance of *American Safety* has been effectively foreclosed by the Supreme Court. Accordingly, arbitration pursuant to a valid arbitration agreement, is an appropriate forum for the resolution of antitrust disputes. Appellant's argument is thus baseless and wholly without merit.

Finally, Appellant contends that the arbitration award is defective because the Arbitrator in the instant matter "admitted that he lacks the expertise in antitrust issues."[2] Brief of Appellant-Plaintiff, p. 29. However, even a cursory examination of what the Arbitrator actually stated indicates *not* that he lacked any necessary expertise. Instead, he simply saw no legal validity to Appellant's position but invited Appellant to persuade him of such validity if he could. Obviously, Appellant failed to do this, which is *not* a legitimate basis for overturning the arbitration award. Of equal or even greater

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[2] This argument and Appellant's entire supporting declaration with its accompanying exhibits, were not presented to the District Court and are matters not properly before this Court. *See, K-2 Ski Company v. Head Ski Co., Inc.*, 506 F.2d 471, 475 (9th Cir. 1974). Defendant-Appellant accordingly objects to any consideration of arguments and evidence relying on such matters, specifically including Appellant's contentions in his declaration that he was misled and failed to understand that binding arbitration was being conducted. More significantly, however, none of those contentions change in any way the correctness of the District Court's dismissal of Appellant's claim, as otherwise set forth by the points and authorities in this opposing Brief.

significance, this Court has noted that "an arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of law.' " *Todd Shipyards, supra*, 943 F.2d at 1060. Confirmation of the award is required even in the face of "erroneous . . . misrepresentations of law." *Id.* It is not even enough that the arbitrator *"may have failed to understand or apply the law. . . . "* (Emphasis added). *Id.* Thus, Appellant's position in this respect has neither any factual or legal merit whatsoever.

Moreover, Appellant does not allege that the arbitrator did not render an honest decision. The record is clear, as evidenced by Appellant's own fifty-page "Closing Brief," that Appellant received a full and fair hearing. *See, Todd Shipyards, supra*, 943 F.2d at 1060. Thus, even if the arbitrator did not fully understand the antitrust issues, rather than simply disagreeing with Appellant about their validity, consistent with the law of this Circuit, his award must be upheld. *Id.*

Accordingly, the District Court properly confirmed the arbitration award pursuant to the Federal Arbitration Act.

E. Regardless Of Whether The District Court Erred In Confirming The Arbitration Award, The Order Of The District Court Should Be Affirmed Because The Law, As Correctly Applied, Requires The Same Result.

As discussed in the preceding sections, the District Court properly granted Appellee NECEL's motion for confirmation of the arbitration award and dismissal of Appellant's claims. In its moving papers filed in the

District Court, Appellee NECEL also alternatively requested the court to dismiss Appellant's claim for failure to state a claim pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), or for summary judgment and/or summary adjudication pursuant to Federal Rule of Civil Procedure 56. The District Court did not address these requests, based upon its decision to confirm the arbitration award. Thus, even assuming *arguendo* that Judge Whyte incorrectly granted Appellee NECEL's motion for confirmation of the arbitration award, the District Court's judgment should be affirmed if *either* of Appellee's alternative motions would require the same result.

This reflects the well-settled appellate practice rule that,

> . . . [A] judgment, which is correct in ultimate effect, will not be disturbed on appeal even though the lower court relied upon a wrong ground or gave an untenable reason for its action. *The issue on appeal is the correctness and ultimate effect of a judgment and not the reason or reasons given for it by the trial court.* If the judgment is sustainable upon any legal basis, it will be upheld on appeal despite the erroneous or untenable reasons given by that court for its entry.

In re Public Service Co. of New Hampshire, 879 F.2d 987, 989 (1st Cir. 1989).

In *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), this Court applied this rule to affirm a district court's actions dismissing a case. In that case, the defendants raised on appeal several alternative grounds for dismissing a case

which were originally raised in their moving papers in the district court. This Court noted the general rule that an appellate court may affirm the district court's ruling on any basis supported by the record. "If the opinion below is correct, it must be affirmed, even if the district court relied on wrong grounds or wrong reasoning." *Id.* at 722, *citing*, *Keniston v. Roberts*, 717 F.2d 1295, 1300 and n.3 (9th Cir. 1983). *See also*, *Riley Co. v. Commissioner*, 311 U.S. 55, 59, 61 S. Ct. 95, 97 (1940) (where the decision below is correct, it must be affirmed by the appellate court even though the lower tribunal gave the wrong reason for its action).

Thus, if either of Appellee NECEL's alternative theories raised below would require the same result reached by the District Court herein, the order of the District Court must be affirmed. As the following discussion will demonstrate, both alternative theories so require.

1. Regardless Of Confirmation of the Arbitration Award, The District Court Could Have Dismissed Appellant's Complaint For Failure To State A Claim Is Barred By *Res Judicata* And/Or Collateral Estoppel Arising From The Arbitration Award.

Even if the District Court's confirmation of the arbitration award is deemed incorrect, the award still may be considered as final for *res judicata* or collateral estoppel purposes. *See*, *Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168 (8th Cir. 1989); *American Fed. of Television & Radio Artists v. WCCO*, 934 F.2d 987, 991 (8th Cir. 1991). In order to apply collateral estoppel or *res judicata*, the Court must determine: (1) whether the issues at arbitration and

before the court are the same; (2) whether there was a final judgment on the merit in the arbitration; (3) whether the party sought to be estopped was a party to the arbitration; and (4) whether the party sought to be estopped had a full and fair opportunity to be heard at the arbitration hearing on the issues to be adjudicated. *Wellons, Inc., supra,* 869 F.2d at 1170; *American Fed. of Television & Radio Artists, supra,* 934 F.2d at 991. In a wrongful termination claim, a crucial issue is what the arbitrator determined to be the reason for the party's discharge, which will bind the Court under the doctrine of collateral estoppel and support summary judgment based thereon. *See, Vacca v. Viacom Broadcasting of Missouri, Inc.,* 875 F.2d 1337, 1339 (8th Cir. 1989).

In this case, the issues clearly are the same, as confirmed by a review of the Appellant's arbitration complaint, the arbitration award itself, the Appellant's original Complaint and the First Amended Complaint. All of the essential issues raised in the claims in the First Amended Complaint were addressed by the Arbitrator. The only causes of action in the First Amended Complaint not expressly addressed by the Arbitrator are the Fifth Cause of Action for negligent infliction of emotional distress, the Ninth Cause of Action for unjust enrichment, and the Eleventh Cause of Action for conspiracy. These are all derivative claims based on the other claims already specifically addressed and dismissed by the Arbitrator. Since the same essential facts have already been decided, these claims must be precluded, as well as the claims the Arbitrator specifically addressed, on the basis of collateral estoppel and/or *res judicata*. (*See,* Undisputed

Material Fact No. 8 at SER C, p. 58); *Vacca v. Viacom Broadcasting of Missouri, Inc., supra.*

The arbitration award itself was also clearly a judgment on the merits of the Appellant's claims, and Appellant clearly was a party to the proceedings. (*See,* Undisputed Material Fact No. 9 at SER C, p. 58-59). The final prong of the analysis, that Appellant was given a full and fair opportunity to be heard, was confirmed simply by the 50-page length of his own "Closing Brief" detailing the evidence and argument that he submitted. (*See,* Undisputed Material Fact No. 7 at SER C, p. 58). Thus, all of the requirements for application of collateral estoppel and/or *res judicata* are met in this case.

As the Ninth Circuit held in affirming a lower court's granting of summary judgment,

> . . . the subject matter of the first cause of action was a part of the claim submitted to the arbitrators. Their award in "full settlement of all claims submitted" therefore disposed of that cause of action, leaving nothing pending in the district court.

Albin Stevedore Co. v. Central Rigging & Contracting Corp., 308 F.2d 347 (9th Cir. 1962). Relying on the *Albin Stevedore Co.* case, the court in *Dalow Industries, Inc. v. Jordache Enterprises, Inc.,* 631 F. Supp. 774, 778 (S.D.N.Y. 1985) granted a motion to dismiss for failure to state a claim on the basis that an arbitration award disposed of the issues raised in the party's complaint. The District Court, had it reached this alternative theory below, could have entered an order dismissing the Appellant's First Amended Complaint on the same basis, and specifically that it failed to state a claim upon which relief can be granted, as barred

by *res judicata* and/or collateral estoppel arising from the arbitration award. *See also, Ivery v. United States*, 686 F.2d 410 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1428 (1983).

2. The District Court Could Have Dismissed The Appellant's Action On A Summary Judgment Basis Because Of The *Res Judicata* Effect Of The Arbitration Award Regardless Of Its Confirmation.

With particular respect to summary judgment, it is well recognized that, to avoid summary judgment, a party must demonstrate the existence of significant probative evidence relevant to disputed factual issues which are truly material and require litigation. *OSC Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd.*, 792 F.2d 1464, 1466-67 (9th Cir. 1986). Where, as here, the moving party has shown an absence of material triable issues of fact and the opposing party has failed to come forward with specific facts, and not merely allegations, to show that genuine factual issues remain for trial, summary judgment should be entered by the Court. *See, DeHorney v. Bank of America Nat'l. Trust & Sav. Assn.*, 879 F.2d 459 (9th Cir. 1989); *Donahue v. Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54 (2nd Cir. 1987).

Whether or not the confirmation of the arbitration award was proper, the District Court could have entered summary judgment based thereon, because of the *res judicata* effect of the arbitration award. *See, Wellons, supra*, 869 F.2d at 1168; *Thibodeau v. Crum*, 4 Cal. App. 4th 749 (1992).

In its recent decision in the *Thibodeau* case, the California Court of Appeal thoroughly reviewed the legal principles regarding the application of an arbitration award to a subsequent civil action involving matters that were or could have been raised in a preceding arbitration. Just as the federal courts have held, the California court confirmed that the doctrine of *res judicata* applies to arbitration proceedings as well as to judicial proceedings, and to matters that could have been arbitrated but were not. *Id.* at 755.

Equally significantly, the *Thibodeau* court confirmed that an arbitration award, whether or not it already has been confirmed, can act "as the equivalent of a final judgment" for purposes of application of *res judicata. Id.* at 759. As the *Thibodeau* court observed, quoting from *Lehto v. Underground Constr. Co.*, 69 Cal. App. 3d 933, 939 (1977), "Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter *res judicata* . . . [E]very presumption favors the arbitrator's award, and the merits of the award, either on questions of law or fact, are generally not subject to review." *Thibodeau v. Crum, supra,* at 759-60.

The same essential principles regarding arbitration and its *res judicata* effect as set forth in the *Thibodeau* decision are followed by the federal courts under the Federal Arbitration Act. *See, Wellons, Inc. v. T.E. Ibberson Co., supra; American Fed. of Television & Radio Artists v. WCCO, supra; Hybert v. Shearson Lehman/American Exp., Inc.*, 688 F. Supp. 320 (N.D. Ill. 1988); *Pugol v. Shearson/American Exp., Inc.*, 829 F.2d 1201, appeal after remand, 877 F.2d 132 (1st Cir. 1987). Not only does *res judicata* arise from the arbitration award, but whether or not it

has been confirmed does not affect the scope and validity of its preclusive effect on a *res judicata* basis. As the court in the *Hybert* case observed:

> Confirmation of an arbitration award in federal court does not add to the claim preclusive effect of an arbitration decision, except as to the narrow class of issues which can be raised on a motion to vacate the award. *See*, 9 U.S.C. § 10. The confirmation means only that the arbitration decision is valid, i.e., was not procured by corruption, fraud or other prohibited misconduct, and that the arbitrators have not exceeded their powers. (citations omitted.)

Hybert v. Shearson Lehman/American Exp., Inc., supra, 688 F. Supp. at 327.

Since the Appellant in this case did not even attempt to vacate the award, and obviously no longer can do so on a timely basis, it is clear that the arbitration award has a preclusive *res judicata* effect as to all of the claims he has attempted to assert in this action. Accordingly, the District Court clearly could have entered summary judgment based on the *res judicata* effect of the parties' arbitration award.

The only argument even remotely raised by the Appellant to somehow address the Appellee NECEL's motion to dismiss and motion for summary judgment is that he somehow "believed" he was not subject to binding arbitration because he assertedly refused to sign an employment contract containing an arbitration provision. This purported evidence blatantly contradicts his own sworn and verified statements in his First Amended

Complaint that he relied on the Appellee's binding arbitration procedure for employee complaints for part of his alleged contract for continuous employment requiring good cause for his discharge. (See, ¶¶ 4 and 4(c) at pages 4 and 6 of the First Amended Complaint.) Moreover, the Appellant clearly proceeded under the Appellee's policy expressly calling for binding arbitration without making any claim to the Arbitrator that he was not subject to its binding aspects. Regardless of whether the Appellant might properly have refused to submit any or all of his claims to the binding arbitration procedure, once he did, he no longer possessed the right to raise any issue that his claims should not have been subject to the arbitration procedure he elected to pursue. *See, Piggly-Wiggly Operators Warehouse, Inc. v. Piggly-Wiggly Operators Warehouse Independent Truck Drives* [sic] *Union*, 611 F.2d 580 (5th Cir. 1980); *Jarrell v. Wilson Warehouse Co.*, 490 F. Supp. 412, 417 (M.D. LA. 1980); *ATSA of Calif., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983).

Therefore, regardless of the propriety of the confirmation of the arbitration award, the District Court could have either dismissed Appellant's complaint for failure to state a claim as barred by the *res judicata* effect of the arbitration award, or it could have entered summary judgment based thereon as a result of the *res judicata* effect.

V

STATEMENT OF RELATED CASES

Appellee knows of no related cases pending before this Court.

VI

CONCLUSION

The District Court in the instant matter properly granted Appellee NECEL's motion for confirmation of the arbitration award which was granted in favor of Appellee NEC Electronics, Inc. and against Appellant Peter P. Nghiem. Even if the confirmation of the award was not proper, however, the judgment should be affirmed based upon one or both of Appellee's alternative grounds also presented to the District Court. Appellee NECEL, therefore, respectfully requests that this Court affirm the decision of the District Court granting its motion and dismissing Appellant's case. Appellant's appeal should be denied as it has no basis in law, and instead costs should be taxed against Appellant pursuant to Federal Rule of Appellate Procedure 39.

Date: November 16, 1992

Respectfully submitted,

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No. 92-16155

In The United States Court of Appeals for the Ninth Circuit

PETER P. NGHIEM, PLAINTIFF AND APPELLANT
v.
NEC ELECTRONICS, INC., a California corporation; NEC CORPORATION (TOKYO); JAPAN (NIPPON ELECTRIC COMPANY), a Japanese corporation; HIRO HASIMOTO, DR. H. YOSHIZAWA, GRANT HULSE and DOES 1-100 Inclusive,
DEFENDANTS AND APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE RONALD M. WHYTE

OPPOSITION OF DEFENDANT-APPELLEE NEC ELECTRONICS INC. TO PLAINTIFF-APPELLANT PETER NGHIEM'S REVISED REPLY BRIEF

(Filed Jan. 5, 1993)

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TABLE OF CONTENTS

PAGE

I INTRODUCTION 1

II ARGUMENT 3

A. The Court Should Disregard Pages 2:5 Through 5:9 Of Appellant's Revised Reply Brief Because The Discussion Contained Therein Improperly Addresses A Legal Argument For The First Time 3

B. The Court Should Strike Pages 15 Through 20 Of Appellant's Revised Reply Brief, The Supplemental Declaration Of Peter Nghiem, And The Supplemental Excerpts Of Records, Because They Support An Improper Attempt To Vacate The Arbitration Award 4

C. Appellee NECEL Is Entitled To Monetary Sanctions In The Amount Of Reasonable Attorney's Fees Incurred As A Result Of Appellant's Frivolous Motion To Exceed Page Limits 6

III CONCLUSION 7

TABLE OF AUTHORITIES

PAGE(S)

CASES

Cross v. State of Washington, 911 F.2d 341 (9th Cir. 1990) 3, 5

Interior Finish Contractors v. Drywall Finishers, 625 F. Supp. 1233 (E.D. Pa. 1985) 5, 6

International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401 (9th Cir. 1985) 4

Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990) 4, 5

STATUTES

Federal Arbitration Act 9 U.S.C. section 1, *et seq.* 3
United States Code Title 9 5

OTHER AUTHORITIES

Federal Rules of Civil Procedure 5

I

INTRODUCTION

This matter is before the Court pursuant to an appeal from a motion for confirmation of an arbitration award granted in favor of Defendant-Appellee NEC Electronics, Inc. ("NECEL") and against Plaintiff-Appellant Peter P. Nghiem ("Nghiem"). Appellant Nghiem filed his Opening Brief with this Court on October 14, 1992. In response, NECEL filed its Brief on November 16, 1992. Finally, on December 14, 1992, Nghiem filed his Reply Brief with this Court.

Concurrent with that Reply Brief, Nghiem filed a motion to exceed page limits, together with a "Supplemental Excerpts of Record." The entire filing consisted of a forty-page Reply Brief, a ten-page "Supplemental Declaration of Peter Nghiem" in support of that Brief, and an eighty-four page "Supplemental Excerpts of Records for Reply Brief of Appellant-Plaintiff."

Appellee NECEL objected to both the manner and the content of Appellant's submission, and filed a response thereto on December 16, 1992. On December 22, 1992, this Court denied Appellant Nghiem's motion to exceed the page limits, and ordered Appellant to file a

reply brief not to exceed 25 pages by December 28, 1992. In addition, the Court stated that Appellant's request to file supplemental excerpts of record as well as Appellee's opposition thereto would be referred for disposition to the merits panel.

On January 4, 1993, Appellee NECEL was personally served with a copy of Appellant's "Revised Reply Brief." In essence, the revised brief is merely a copy of the original Reply Brief, edited to satisfy the page length requirement as ordered by the Court. Consequently, the objections raised by Appellee NECEL in its December 16, 1992 filing are equally applicable to Appellant's Revised Reply Brief. Accordingly, Appellee NECEL seeks to preserve and restate its objections by filing the instant opposition. For the assistance of the merits panel, Appellee NECEL hereby sets forth its objections to Appellant's Revised Reply Brief.

Initially, Section A of Appellant's Revised Reply Brief, which is contained at pages 2 through 5, improperly raises a new legal theory for the first time. Moreover, Section D of Appellant's Revised Reply Brief, which is contained at pages 15 through 20, does not respond to issues raised in Appellee's Brief. Rather, this section functions as a wholly improper and untimely attempt on the part of Appellant Nghiem to vacate the arbitration award. In addition, Appellant's attempt to "incorporate by reference" the facts contained in the "Supplemental Declaration of Peter Nghiem" and the "Declaration of Peter Nghiem," is wholly improper.

Accordingly, for these reasons, as set forth in greater detail below, Appellee NECEL respectfully requests that

this Court strike Section A and Section D of Appellant's Revised Reply Brief and the Supplemental Excerpts of Records filed by Appellant Nghiem. In addition, Appellee NECEL requests that this Court disregard the "incorporated" facts contained in the "Supplemental Declaration of Peter Nghiem" and the "Declaration of Peter Nghiem."

II

ARGUMENT

A. The Court Should Disregard Pages 2:5 Through 5:9 Of Appellant's Revised Reply Brief Because The Discussion Contained Therein Improperly Addresses A Legal Argument For The First Time.

In his Revised Reply Brief, Appellant's first argument is captioned "Federal Arbitration Act Does Not Apply To The Instant Case Where Appellant-Plaintiff Had A Contract Of Employment Within The Meaning Of The Exclusion In 9 U.S.C. Section 1." Appellant devoted eight pages of his Opening Brief to a discussion of the trial court's allegedly improper reliance on the Federal Arbitration Act, and the reasons why the Act, in Appellant's opinion, did not apply to this case.

Appellant did not, however, raise the legal theory in his Opening Brief, as he does in Section A of his Revised Reply Brief, that "Federal Arbitration Act Does Not Apply To The Instant Case Where Plaintiff-Appellant Had A Contract Of Employment Within The Meaning Of The Exclusion In 9 U.S.C. Section 1." Appellant's attempt to abandon his previous legal theories in favor of an entirely

new one, which Appellee NECEL has not had the opportunity to address, is not proper and should not be condoned.

This Court has recently addressed this precise issue. In *Cross v. State of Washington*, this Court stated that "[i]n their reply brief, the Crosses appear to contend that they possess aboriginal rights in the disputed property. This argument, however, was not specifically and distinctly raised and argued in the Crosses' opening brief and we will therefore not consider it." 911 F.2d 341, 345 (9th Cir. 1990). *See, also, International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief."); and *Sanchez v. City of Santa Ana*, 915 F.2d 424, 430 (9th Cir. 1990) ("As a general rule, an appellant may not raise an argument for the first time in a reply brief. The City offers no justification for departure from this rule, and we therefore decline to address its argument.").

Accordingly, this Court should disregard Appellant Nghiem's new argument, which is contained at pages 2 through 5 of his Revised Reply Brief, according to its well-established precedent precluding consideration of any arguments raised for the first time in a reply brief.

B. The Court Should Strike Pages 15 Through 20 Of Appellant's Revised Reply Brief, The Supplemental Declaration Of Peter Nghiem, And The Supplemental Excerpts Of Records, Because They Support An Improper Attempt To Vacate The Arbitration Award.

In his Revised Reply Brief, Appellant attempts to convince this Court to vacate the arbitration award which

was confirmed by the District Court, and which thus provided the impetus for the instant appeal. Appellant argues at Pages 15 through 20 of his Revised Reply Brief that he is "Entitled To Vacation Of The Award." This proposition is so far outside the realm of legal feasibility that it is not deserving of a lengthy response.

Preliminarily, in accordance with the discussion above in Section A, Appellant's argument that this Court should vacate the arbitration award should not be considered because it was not raised in Appellant's Opening Brief. *See, e.g., Cross v. State of Washington*, 911 F.2d 341, 345 (9th Cir. 1990); *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990).

A more pressing concern for Appellant, however, is that he has *never*, in the course of this litigation, attempted to vacate the arbitration award. Appellant initiated these proceedings by filing a Complaint in the Santa Clara County Superior Court on February 5, 1992. (See Exh. A to Supplemental Excerpts of Record For Brief of Appellee-Respondent.) The case was subsequently removed to the Northern District of California by Appellee NECEL. (See Exh. B to Supplemental Excerpts of Record For Brief of Appellee-Respondent.) During the entire pendency of these lower court proceedings, Appellant never attempted to vacate the arbitration award. His misguided attempt to do so at this late stage in the litigation is patently frivolous.

The Federal Rules of Civil Procedure and Title 9 of the United States Code set forth the appropriate procedure for a party to apply to vacate an arbitration

award.[1] After reading the statutory provisions and rules together, "it is clear that a party must file a motion in order to apply to the [district] court to set aside an arbitration." *Interior Finish Contractors v. Drywall Finishers*, 625 F. Supp. 1233, 1240 (E.D. Pa. 1985). The "statutes and rules do not permit a party to initiate a challenge to an arbitration award by filing a *complaint* or an 'Application.'" *Id.* (*Emphasis added.*) Thus, even the asserted basis in Appellant Nghiem's Revised Reply Brief that his complaint was an attempt to vacate the arbitration award is wholly without legal foundation.

Accordingly, pages 15 through 20 of Appellant's Revised Reply Brief should be disregarded by this Court. Further, the "Supplemental Declaration of Peter Nghiem" and the "Supplemental Excerpts of Records for Reply Brief," which were filed concurrently with Appellant's Reply Brief, should likewise not be considered by this Court.

C. Appellee NECEL Is Entitled To Monetary Sanctions In The Amount Of Reasonable Attorney's Fees Incurred As A Result Of Appellant's Frivolous Motion To Exceed Page Limits.

Appellee NECEL renews its request for monetary sanctions. In the interest of brevity, Appellee respectfully refers this Court to Section D of the "Opposition Of Defendant-Appellee NEC Electronics Inc. To Motion Of

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[1] A detailed discussion of this procedure is set forth in *Interior Finish Contractors v. Drywall Finishers*, 625 F. Supp. 1233 (E.D. Pa. 1985) at page 1240.

Plaintiff-Appellant Peter Nghiem To Exceed Page Limits And To File Supplemental Excerpts Of Record," which was filed on December 16, 1992, in the event the Court finds it helpful or necessary to review in any greater detail the legal authority on which this request is based.

III

CONCLUSION

Appellant's attempt to improperly raise new legal arguments, as well as his illegitimate attempt to seek a vacation of the arbitration award from this Court without having timely petitioned the lower court to do so, should be wholly disregarded. Because Appellant has continued these improper assertions in his "Revised Reply Brief" after already having been put on notice of that impropriety by Appellee's Opposition to his motion to exceed page limits and file supplemental excerpts for his original reply brief, sanctions in Appellee's favor against Appellant are particularly appropriate and should be assessed.

Date: January 5, 1993.

Respectfully submitted,
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation

By: /s/ David J. Murphy
DAVID J. MURPHY

By: /s/ Keith R. Black
KEITH R. BLACK

Attorneys for Defendant-Appellee
NEC ELECTRONICS INC.

IN ARBITRATION PROCEEDINGS

In the Matter of a Controversy Between:	)
PETER NGHIEM	)
and	)
NEC ELECTRONICS	)
Volume I	)
No. 7430-0287-90	)

DATE: Thursday, February 7, 1991

TIME: 10:00 a.m.

LOCATION: American Arbitration Association
417 Montgomery Street
San Francisco, California

Reported by:

CAROL FUSCO, CSR 3269

RADOCY & ASSOCIATES

63 MULLEN AVENUE

SAN FRANCISCO, CALIFORNIA 94110

(415) 285-4396

* * *

[p. 12] today than they did at any other time.

With all of that, does anybody have any other preliminary matters?

If not, we may follow the following choreography. In the first place, the company has the burden to prove that

it complies with Mr. Nghiem's employment contract in his termination.

Mr. Nghiem would have the burden with respect to any other aspects of wrongful termination, that count, to the implied breach of the covenant of good faith – I am sorry, the breach of an implied contract, namely, to prove that there is such a contract, and that it was breached;

Secondly, that there is a breach of a covenant of good faith and fair dealing, namely that there was such a covanant, which may be implied from the documents already, and secondly, that there was a breach of it;

That there was intentional infliction of emotional distress; that there was defamation; and that there was an antitrust violation, including the threshold question of whether you can even have a standing on the [p. 13] part of an individual to claim that there was an antitrust violation that would run to that individual. I just don't know. I mean, you have the burden to establish that.

Obviously, the company would then have whatever affirmative defenses it wishes to produce.

The company will go forward, presenting Mr. Mitchell, Mr. Nieto and Mr. Hulse as its witnesses, subject to cross-examination. The company contemplates that's the conclusion of its case in chief, unless something comes up.

As I have indicated, I am flexible on this, so let's not get too formal with it.

Mr. Nghiem will then testify. Then we will have the testimony of Messrs. Frolichman, Yoshizowa and Hashimoto, in whatever order Mr. Nghiem wishes to call them.

With respect to three other witnesses, Mr. Dasilva, Mr. Goto and Mr. Yamaguchi, whether or not they are required to testify will depend upon the company's study of Mr. Nghiem's offer to accept as true or substantially true what is stated in his

* * *

IN ARBITRATION PROCEEDINGS

In the Matter of a Controversy Between:	)
PETER NGHIEM	)
and	)
NEC ELECTRONICS	)
Volume III pages 378-667	)
No. 7430-0287-90	)

DATE: Wednesday, April 4, 1991

TIME: 9:30 a.m.

LOCATION: American Arbitration Association
417 Montgomery Street
San Francisco, California

REPORTER: CAROL FUSCO, CSR 3269

RADOCY & ASSOCIATES

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* * *

[p. 499] MR. NGHIEM: No.

THE ARBITRATOR: I don't know what you think the law is with respect to antitrust. I will allow you to submit that to me, with a copy to Mr. Hulse, before our next meeting so I can look it up.

MR. NGHIEM: Okay.

THE ARBITRATOR: Because I do not know of an active claim by an employee who is given a work assignment – which is all it was – and then in some view believes that that work assignment was sabotaged by somebody for lack of support, either intentionally or negligently, to lead to an antitrust violation, at least where there is no profit sharing arrangement involved.

And as a – I mean, assuming that you prove all your facts, that's it on the – you do that if you want to pursue the antitrust claim.

Now, do you have any other questions of Mr. Hulse based on his testimony?

MR. NGHIEM: Yes. Should I move on to the incidents, get to the point?

THE ARBITRATOR: You may ask your

* * *

Supreme Court, U.S.
FILED
NOV 29 1994
OFFICE OF THE CLERK

No. 94-677

In The

Supreme Court of the United States

October Term, 1994

PETER P. NGHIEM,

Petitioner,

v.

NEC ELECTRONICS, INC., A CALIFORNIA CORPORATION; NEC CORPORATION (TOKYO), JAPAN (NIPPON ELECTRIC COMPANY), A JAPANESE CORPORATION; HIRO HASHIMOTO; H. YOSHIZAWA, DR.; GRANT HULSE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PETITIONER'S REPLY BRIEF 1

I. Grounds Presented Were Sufficient For Granting A Writ Of Certiorari Authorized By 28 U.S.C. Section 1254 Under Supreme Court Rule 10 And An Extraordinary Writ Authorized By 28 U.S.C. Section 1651(a) Under Supreme Court Rule 20.1 1

II. Exceptional Circumstances Shown In Petitioner's Briefs Are Basis For Raising Questions For The First Time On Appeals 3

III. The Court Should Grant The Petition To Settle The Important Question Whether The Lower Courts Lack Jurisdiction To Confirm The Arbitration Award In Light Of The Exclusion Provision In 9 U.S.C. Section 1 Which Applies To The Employment Contract Of Petitioner, A Worker Engaged In Foreign And Interstate Commerce 5

IV. The Court Should Grant The Petition To Resolve The Lower Courts' Erroneous Findings Of Facts That Lead To A Grossly Misapplied Conclusion Of Law To Confirm The Arbitrary And Capricious Arbitration Award, And Therefore, Deprive Petitioner's Right To Due Process And Manifest Injustice 6

TABLE OF CONTENTS – Continued

Page

V. The Court Should Grant The Petition To Consider The Question Whether Respondents Violated Antitrust Laws And Section 4 Of Clayton Act In Wrongfully Discharging Petitioner For Not Cooperating With Their Illegal Restraint Of Trade And Price Fixing Conspiracy, Which Was Not Resolved At Arbitration 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES CITED:

Armco Steel Co., L.P. v. CSX Corp., 790 F.Supp. 311 (D.D.C.1991) 8

Ashmore v. Northeast Petroleum, 843 F.Supp. 759 (D.Me.1994) 10

Bacashihua v. U.S. Postal Serv., 859 F.2d 405 (6th Cir.1988) 5

Cathcart-Maltby-Clearview, Etc. v. Snohomish, 634 P.2d 853 (1981) 4

Cohen v. Cowles Media Co., 111 S.Ct. 2513 (1991) 4

Copley v. NCR Corporation, 394 S.E.2d 751 (1990, W.Va) 5

Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238 (1985) 6

Donahue v. Pendleton Woolen Mills, Inc., 633 F.Supp. 1423 (S.D.N.Y.1986) 10

FSLIC v. Butler, 904 F.2d 505 (9th Cir.1990) 1

Herring v. Delta Airlines, Inc., 894 F.2d 1020 (9th Cir.), 110 S.Ct. 1319 (1990) 5

Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir.1984) 8

Lucas v. Bechtel Corp., 633 F.2d 757 (9th Cir.1980) 9

McDougald v. Jenson, 786 F. 2d 1465 (11th Cir.1986) 4

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985) 7, 8, 9

Newport v. Fact Concerts, Inc., 101 S.Ct. 2748 (1981) 4

TABLE OF AUTHORITIES – Continued

Page(s)

O'Connor Co. v. Carpenters Local Union No. 1408, 702 F.2d 824, 825-26 (9th Cir.1983) 6

Ostrofe v. H.S. Crocker Co., 740 F.2d 79 (9th Cir.1984), *cert. dismissed at request of parties*, 105 S.Ct. 1155 (1985) 10

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 87 S.Ct. 1801 (1967) 7

Ralph Andrews Productions v. Writers Guild, 938 F.2d 128 (9th Cir.1991) 6

Rosen v. Transx LTD., 816 F.Supp. 1364 (D.Minn.1993) 5

St. Louis v. Praprotnick, 108 S.Ct. 915 (1988) 4, 5

State ex rel. Pioli v. Higher Education Personnel Board, 558 P.2d 1364 (1976) 4

Stevens v. Department of Treasury, 111 S.Ct. 1562 (1991) 4

Telum, Inc. v. E. F. Hutton Credit Corp., 859 F.2d 835 (10th Cir.1988) 6

The Bremen [v. Zapata Off-shore Co.] 92 S.Ct. [1907] (1972) 8

United States v. Simpson, 927 F.2d 1088 (9th Cir.1991) 3

United Steelworkers of America v. Warrior & Gulf Navigator Co., 80 S.Ct. 1347 (1960) 7

U.S. v. Williams, 112 S.Ct. 1735 (1992) 4

Virginia Bankshares, Inc. v. Sandberg, 111 S.Ct. 2749 (1991) 5

Weeks v. Weeks, 556 So.2d 348 (Miss.1990) 2

TABLE OF AUTHORITIES – Continued

Page(s)

Wesley v. Schneckloth, 346 P.2d 658 (1959) 3

Western Employers Ins. Co. v. Jefferies & Co., 958 F.2d 258 (9th Cir.1992) 6

STATUTES CITED:

9 U.S.C. Section 1 et seq. 1, 2, 3, 5

9 U.S.C. Section 9 3

15 U.S.C. Section 1 et seq. 8

15 U.S.C. Section 15 1

28 U.S.C. Section 1254 ..... 1, 2

28 U.S.C. Section 1447(c) 3

28 U.S.C. Section 1651(a) 2

UNITED STATES CONSTITUTION CITED:

Fourteenth Amendment 4

RULES CITED:

Supreme Court Rule 10 ..... 1, 3

Supreme Court Rule 20.1 ..... 1, 3

Fed.R.Civil P.52(a) 7

Fed.R.Civil P.52(b) 7

Fed.R.Civil P.12(b)(6) 9

APPENDIX CONTENTS

APPENDIX H – Memo from Peter P. Nghiem to his Counsel, David H. Tollner, on April 2, 1992 ... 88a

PETITIONER'S REPLY BRIEF

Respondents' arguments highlight why the Supreme Court should grant the petition. Respondents recognize that Petitioner's arguments on the arbitrary and capricious arbitration award, the lack of jurisdiction for lower Courts to confirm the award, and his constitutional right to due process have not been considered. Respondents also concede that the lower courts did not consider Petitioner's claim of fraud in the inducement to accept a binding arbitration clause embedded in the company handbook. Those issues should be resolved by this Court.

Respondents acknowledge that the antitrust violation issue was not resolved at arbitration. Furthermore, Respondents challenge Petitioner's claim of "contracts of employment" exception in 9 U.S.C. Section 1, and his standing to sue and allege antitrust violation under 15 U.S.C. Section 15. Those issues should likewise be decided here.

To disregard several material facts and arguments presented by Petitioner, Respondents rely on the general rule in *FSLIC v. Butler*, 904 F.2d 505, 509 (9th Cir.1990), that appellate court will not consider arguments which are not first raised before district court, absent a showing of exceptional circumstances. However, the specific exceptional circumstances exist in this case and they are clearly pointed out in Petitioner's briefs, on pages i and 8-11 (See also Appendix D, 24a-32a). Taking these extraordinary circumstances into consideration, this Court should review the obvious erroneous findings of facts made by the lower courts that led to a misruling of law to confirm the arbitrary and capricious arbitration award.

I. Grounds Presented Were Sufficient For Granting A Writ Of Certiorari Authorized By 28 U.S.C. Section 1254 Under Supreme Court Rule 10 And An Extraordinary Writ Authorized By 28 U.S.C. Section 1651(a) Under Supreme Court Rule 20.1.

Respondent overlooked the specific exceptional circumstances that warrant the exercise of the Court's

power to issue a writ of certiorari authorized by 28 U.S.C. Section 1254 and an extraordinary writ authorized by 28 U.S.C. Section 1651(a). The apparent intent of Petitioner's Counsel to deny him of the equal protection of the laws by deliberately withholding material facts and critical relevant arguments to influence the court decision,[1] is clearly a condition that is totally out of the ordinary course of events in judicial review (See Appendix D, 24a-27a). In addition, the lack of jurisdiction of the lower Courts to apply the Federal Arbitration Act, 9 U.S.C. Section 1 et seq., to confirm the award also constitutes exceptional circumstance.

By citing opposing cases, Respondents acknowledge the important questions in administration of Clayton Act and application of the exclusion provision in 9 U.S.C.

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[1] Realizing that his Counsel, David H. Tollner, had failed to timely file a motion to vacate the arbitration award, Petitioner wrote a letter to him on April 2, 1992 shortly after Petitioner received NEC's "Motion for Confirmation of Arbitration Award," dated March 18, 1992. In this memo, Petitioner highlighted the important material facts that should be presented to the Court (See Appendix H; Appendix D, 25a; and "Memorandum of Point and Authorities in Opposition to Defendant NEC Electronics, Inc.'s Motion for Confirmation of Arbitration Award . . . ," U.S. District Court Docket No. CV-92-20135 RMW (EAI), prepared by David H. Tollner). The unusual acts of Petitioner's Counsel in hindering and obstructing the due course of justice were further displayed in his refusal to do the oral hearing at the last minute in the Ninth Circuit after he had failed to file a motion to vacate the arbitrary and capricious arbitration award (See Appendix D, 24a and 26a). Taking advantage of the situation, Respondents submitted undignified arguments containing improper insinuations to mislead the Courts. These extraordinary circumstances allowed error to be compounded from the District Court to the Ninth Circuit and deprive Petitioner's right to due process. See *Weeks v. Weeks*, 556 So.2d 348 (Miss.1990).

Section 1 that gave grounds for this Court to grant certiorari. Thus, Petitioner has sufficiently presented special and important reasons for this Court to grant the petition under Supreme Court Rules 10 and 20.1.[2]

II. Exceptional Circumstances Shown In Petitioner's Briefs Are Basis For Raising Questions For The First Time On Appeals.

The exceptional circumstances cited by Petitioner that include the improper legal representation aggravated by the circumstantial procedural errors made by his Counsel and the lack of jurisdiction for the Courts to confirm the award, are basis for him to raise questions for the first time on appeals.[3] The Court in *Wesley v. Schneckloth*, 346 P.2d 658

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[2] Besides, "to implement a remedy for the violation of a recognized statutory or constitutional right" is a legitimate ground for the Court to exercise its supervisory power. See *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir.1991).

[3] Petitioner who was entitled to have the irrational award vacated on the basis of fraud, undue means, witness perjury, manifest disregard of the law, and abuse of discretion and evident partiality of the arbitrator, raised the vacating arguments in the "Reply Brief of Appellant-Plaintiff" in the Ninth Circuit (See Appendix E, 54a-62a; Appendix F, paragraphs 9-21; and Appendix G, paragraphs 1-15). The argument on the exclusion provision in 9 U.S.C. Section 1 was also brought up in the same brief to question the lack of jurisdiction for the District Court to confirm the award under the FAA (See Appendix E, 39a-43; and Appendix D, 27a-31a). Although these questions are considered as new, they are all closely related to Petitioner's previous arguments. The question of lack of jurisdiction had been previously asserted under 9 U.S.C. Section 9 in the absence of an express, executed agreement for binding arbitration.

Under 28 U.S.C. Section 1447(c), "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Court in *Wesley v. Schneckloth*, 346 P.2d 658 (1959), stated that "any judgment

(1959) held that lack of jurisdiction to hear and determine a case meets the "exceptional circumstance" rule, and that evidence of lack of jurisdiction may be received for the first time and considered in an application for writ of habeas corpus.

Respondents argue that it was improper for Petitioner to raise questions of lower Courts' jurisdiction and his constitutional right to due process under the Fourteenth Amendment at the late stage. However, Respondents cited *U.S. v. Williams*, 112 S.Ct. 1735 (1992), where the Court granted certiorari to review a contention that was not advanced in either the District Court or the Court of Appeals by explaining that the fact that the issue was raised in a different case, is an adequate substitute for raising it in the case at hand. By confirming the arbitrary and capricious arbitration award under the FAA, the lower Courts passed on the presented substantive issues including the jurisdiction and due process questions. Respondents had plenty of opportunities to debate Petitioner's due process arguments but they decided to ignore them for their convenience as they had done the same for several other arguments and material facts.

The Supreme Court has held that "it suffices for our purposes that the court below passed on the issue presented," *Stevens v. Department of Treasury*, 111 S.Ct. 1562, 1567 (1991); cf. *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2517 (1991), "particularly where the issue is, 'in a state of evolving definition and uncertainty,' " *St. Louis v. Praprotnick*, 108 S.Ct. 915, 922 (1988) (plurality opinion), quoting *Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748, 2749 (1981),

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entered by constitutional court not having jurisdiction is void ab initio and is in legal effect no judgment at all." See also *McDougald v. Jenson*, 786 F. 2d 1465, 1486 (11th Cir.1986); *Cathcart-Maltby-Clearview, Etc. v. Snohomish*, 634 P.2d 853; *State ex rel. Pioli v. Higher Education Personnel Board*, 558 P.2d 1364, 1367 (1976).

"and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 111 S.Ct. 2749, 2761 (1991); *Praprotnick, supra*, at 108 S.Ct., at 922-923. Accordingly, there is no obstacle for the Court to review the questions presented in this petition.

III. The Court Should Grant The Petition To Settle The Important Question Whether The Lower Courts Lack Jurisdiction To Confirm The Arbitration Award In Light Of The Exclusion Provision In 9 U.S.C. Section 1 Which Applies To The Employment Contract Of Petitioner, A Worker Engaged In Foreign And Interstate Commerce.

The issue of lack of jurisdiction for lower Courts to confirm the award in light of the exclusion provision in 9 U.S.C. Section 1 is ripe for resolution in this case (See Appendix E, 39a-43a; and Appendix D, 27a-31a). It is obvious that the FAA does not apply to Petitioner's contract of employment since he was a worker directly engaged in foreign and interstate commerce within the meaning of the exclusion provision. See *Copley v. NCR Corporation*, 394 S.E.2d 751 (1990, W.Va); *Rosen v. Transx LTD.*, 816 F.Supp. 1364 (D.Minn.1993); *Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir.), 110 S.Ct. 1319 (1990). Contrary to Respondents' argument, the Court in *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 405 (6th Cir.1988) ruled that the individual worker did not have to be personally engaged in interstate commerce to have his claim excluded from the FAA as long as he belonged to a "class of worker engaged in interstate commerce."

The lower Courts' application of the FAA to the instant case is clearly in conflict with the decisions of other courts of appeals. By citing opposing cases, Respondents concede that there is a split in the Circuits concerning the application of the exclusionary clause in 9 U.S.C. Section 1. The Court should grant the Petition to resolve this important federal issue.

IV. The Court Should Grant The Petition To Resolve The Lower Courts' Erroneous Findings Of Facts That Lead To A Grossly Misapplied Conclusion Of Law To Confirm The Arbitrary And Capricious Arbitration Award, And Therefore, Deprive Petitioner's Right To Due Process And Manifest Injustice.

The lower Courts misinterpreted Petitioner's intent in availing himself to arbitration while he was fraudulently induced to accept the binding arbitration clause embedded in the company handbook. The Courts have exclusive obligation to make findings of facts in contrast to rulings of law. Here, the conclusions of law were made by the lower Courts based on a skewed set of facts because of the exceptional circumstances. (See Appendix Appendix D, 24a-26a; Appendix E, 42a; F, G and H; and "Brief of Appellant-Plaintiff," Docket No.92-16155, 6:20-28 to 21:1-24). In quoting *Ralph Andrews Productions v. Writers Guild*, 938 F.2d 128 (9th Cir.1991) where the Court ruled that appellant, through his conduct, did not consent to allow arbitrator to bind him personally, Respondents tacitly concede that Petitioner's conduct, taken as a whole, did not constitute voluntary acceptance of the binding arbitration clause.

The Courts did not expressly consider Petitioner's basic contractual right to arbitrate according to the terms of his intent. See *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985). Petitioner should not be held to the terms of a binding arbitration contract for which he did not bargain, see *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir.1992), particularly, when the binding arbitration clause was induced by fraud. *Telum, Inc. v. E. F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir.1988). The Courts' determination of Petitioner's implicit acceptance of the binding arbitration clause embedded in the company handbook is questionable in light of *O'Connor Co. v. Carpenters Local Union No. 1408*,

702 F.2d 824, 825-26 (9th Cir.1983), and *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 80 S.Ct. 1347, 1352 (1960).

Petitioner would have not availed himself to arbitration without the understanding of nonfinal and nonbinding arbitration against him. Petitioner believed that he was still entitled to a judicial review in the event the arbitration award was erroneous. In fact, Petitioner did everything he could to preserve his rights including the filing of a lawsuit in state court on June 10, 1991 over five months before the arbitrator rendered the award. Petitioner's conduct amply demonstrates an intent not to accept binding arbitration but to only use arbitration forum as a fact finding process for his causes of action in state court. The lower Courts obviously erred in concluding that Petitioner "sat idle while an arbitration decision was rendered" and he "voluntary initiated binding arbitration" (See Appendix H). Pursuant to Fed.R.Civil P.52(a), the lower Courts' findings of fact should be set aside because they are clearly erroneous. Therefore, this Court may amend or make additional findings on motion of Petitioner. Fed.R.Civil P.52(b).

V. The Court Should Grant The Petition To Consider The Question Whether Respondents Violated Antitrust Laws And Section 4 Of Clayton Act In Wrongfully Discharging Petitioner For Not Cooperating With Their Illegal Restraint Of Trade And Price Fixing Conspiracy, Which Was Not Resolved At Arbitration.

Respondents highlight the specific comments of the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3357 (1985), showing why this Court could and should grant the petition, on page 15 of their Brief in Opposition. The *Mitsubishi* Court held that a party resisting arbitration may attack directly the validity of the arbitration agreement. See *Prima Paint Corp. v. Flood*

& Conklin Mfg. Co., 87 S.Ct. 1801 (1967). Moreover, the party may attempt to have the agreement set aside by showing that the agreement was (1) "[a]ffected by fraud, undue influence, or overweening bargaining power; (2) that "enforcement would be unreasonable and unjust"; or (3) that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." *The Bremen [v. Zapata Off-shore Co.]* 92 S.Ct. [1907] at 1914, 1916, 1917 (1972). This quotation applies precisely to the instant case where such showing obviously exists and there is sufficient "basis for assuming the forum inadequate or its selection unfair." See *Mitsubishi, Id.*

Although the Ninth Circuit, in light of *Mitsubishi*, overruled its own precedent case *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir.1984), in its decision on June 3, 1994, the instant case should not be affected because the binding arbitration contract itself was product of violation of antitrust laws, 15 U.S.C. Section 1 et seq. See *Armco Steel Co., L.P. v. CSX Corp.*, 790 F.Supp. 311 (D.D.C.1991). To cover up their antitrust violation, Respondents misrepresented the function and effect of the arbitration agreement as a mandatory fourth step of the NEC's problem resolution process to fraudulently induce Petitioner to submit his claims to binding arbitration. As a result, Petitioner initiated the antitrust claim at arbitration, but he then decided to reserve it for judicial review[4] by not arguing such facts because of the

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[4] The "Closing Brief" was prepared by Robert S. Kahn, Petitioner's Counsel at the end of arbitration (after the last hearing on May 31, 1991), who had carefully examined all the hearing transcripts and exhibits (See Exhibit A of the "Supplemental Excerpts of Records for Reply Brief of Appellant-Plaintiff" filed in the Ninth Circuit, Docket No. 92-16155). The antitrust issue was not addressed in this "Closing Brief." Petitioner thought that private arbitration was not the right forum

arbitrator's misconduct and the irregularities at arbitration (See Appendix F, 71a-75a; Appendix G, 79a-85a; and Appendix H). Parties may exclude selected issues from the scope of arbitration once they agree to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3354 (1985). Therefore, Petitioner's antitrust claim that was not resolved at arbitration, should be allowed to reach the jury where it belongs.

Petitioner's allegations regarding NEC's violation of antitrust laws and his standing to sue are sufficiently well pleaded to withstand a Fed.R.Civil P.12(b)(6) motion.[5] Respondents in challenging Petitioner's standing to assert an antitrust claim bring up a federal issue where there a split among federal courts. The Ninth Circuit has held that an employee subjected to retaliatory discharge and boycott for refusing to cooperate with price fixing conspiracy in violation of the Sherman Act has

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to discuss antitrust issue while the arbitrator presumed that it was abandoned. Besides, Petitioner had filed a lawsuit in state court with eleven causes of action including antitrust violation on June 10, 1991 shortly after the last arbitration hearing and five months before the Arbitrator, John Kagel, rendered the award on November 18, 1991.

[5] In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws. See *Lucas v. Bechtel Corp.*, 633 F.2d 757, 760 (9th Cir.1980). Petitioner's first amended complaint did state antitrust claims under Clayton and Sherman Acts and consequential injury although he had not been given reasonable opportunity to complete discovery and to present more elaborated factual support for his claims (See Petitioner's "First Amended Complaint" filed in state court on Feb. 5, 1992, attached as Exhibit A in the "Supplemental Excerpts of Record for Brief of Appellee-Respondent" filed in the Ninth Circuit, Docket No. 92-16155 and Appendix G, 85a-87a).

standing under Section 4 of Clayton Act[6] to sue for treble damages. *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 79 (9th Cir.1984), *cert. dismissed at request of parties*, 105 S.Ct. 1155 (1985). The instant case is very similar to *Ostrofe*. See also *Ashmore v. Northeast Petroleum*, 843 F.Supp. 759 (D.Me.1994); *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F.Supp. 1423 (S.D.N.Y.1986). To resolve this important question in administration of Clayton Act, the Court should grant the petition.

CONCLUSION

For the foregoing reasons, and for the sake of justice and fairness, the petition for a writ of certiorari and/or an extraordinary writ should be granted.

DATED: November 30, 1994

Respectfully submitted,

PETER P. NGHIEM
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(408) 374-5974

Petitioner Pro Se

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[6] Petitioner's argument on his standing under Section 4 of Clayton Act as a terminated employee who was retaliated for not cooperating with NEC's illegal restraint of trade and price fixing conspiracy, was originally raised in the "Brief of Appellant-Plaintiff" filed in the Ninth Circuit, Docket No. 92-16155, 30:19-26.

APPENDIX H

4324 Vanderbilt Dr.
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April 2, 1992

Mr. David H. Tollner
Attorney At Law
111 N. Market Street
Suite 1020
San Jose, CA 95113

Re: Arguments and Exhibits to be Included in the Opposition to Confirmation of Arbitration Award, Dismissal, Summary Judgment and Summary Adjudication.

Nghiem vs. NEC Electronics Inc.
California Superior Court Case # 712367
U.S. District Court Case # C-92-20135 WAI (EAI)

Dear Mr. Tollner:

After reviewing the legal documents from NEC Electronics Inc. to remove the lawsuit from the Superior Court of the State of California to the U.S. District Court, I would like to take this opportunity to clarify a few certain facts that you can include in your arguments to oppose NEC's motion for confirmation of arbitration award, dismissal, summary judgment and/or summary adjudication.

NEC apparently attempted to cloud the issues to be ruled by the Court by not transferring the complete set of Plaintiff's complaint filed in the State Court to the Federal Court. NEC tries to mislead the Court to believe that there was a written agreement between Plaintiff and NEC

on binding arbitration, therefore, arbitration award should be confirmed and Plaintiff's complaint should be dismissed. Since NEC's tactics is to confuse the relevant issues and then present its arguments based on incomplete and unwarranted facts, it is critical for us to keep the case well outlined for the Court by submitting the "index of exhibits" and "list of chronological events", and several other important exhibits listed below:

"I"	Department of Fair Employment and Housing Complaint filed by Nghiem.
"A"	Original Employment Invention and Confidential Information Agreement signed by Nghiem.
"B"	Modified 1987 version of Agreement entitled Employment, Invention, Authorship, Proprietary Confidential Information, and Arbitration Agreement.
"17A-17F"	Memo from P. Nghiem to D. Mitchell (5/9/90) Re: Management Problems in Strategic Marketing Group.
"30-33"	Summary of "CAD/COT Strategic Marketing Activities" prepared by P. Nghiem (4/11/90).
"S4-S5"	Appeal to the California Unemployment Insurance Appeals Board (9/28/90).
"K"	Civil Rights Act of 1991 (Title I: Federal Civil Rights Remedies. Title II: Glass Ceiling).
"L"	Memo from P. Nghiem to David Weinberg, Director of Labor Services at AAA, cc. J. Kagel, D. Mitchell and R. Kahn (11/27/91). Re: Request for Trial Denovo [sic] and Plaintiff's Position on Arbitrator's ruling.

"M" Memo from P. Nghiem to Congressman Tom Lantos (12/6/91) Re: Employment Discrimination at NEC Electronics Inc.

"N" Memo from P. Nghiem to D. Weinberg (6/5/91) Re: Misrecording of Plaintiff's Testimony.

"O" NEC's Closing Brief at AAA arbitration signed by Grant Hulse, stamped 9/9/91.

"P" Transcripts of hearings on Employment Discrimination by Japanese-owned Companies in the United States held by the Employment and Housing Subcommittee of the Committee on Government Operations, U.S. House of Representatives, presiding by Congressman Tom Lantos.

Several decisive points that can be effectively incorporated into our Opposition to Summary Judgment are presented below:

1) Plaintiff signed an "Employment, Invention and Confidential Information Agreement" with NEC on 8/31/89 which did not contain an arbitration agreement provision as specified in paragraph 10 of the November 1987 modified version entitled "Employment, Invention, Authorship, Proprietary and Confidential Information, and Arbitration Agreement". Plaintiff refused to sign the November 1987 version because of the undoubtful language regarding to the employment at-will status and additional final and binding arbitration agreement. (See legal arguments of Robert Kahn on employment contract from p. 28 to p. 37 of Closing Brief at private arbitration.) It appears that the employment contract signed by Plaintiff, is the same old version signed by Thomas Mc. Dannald and Edward A. Neubauer.

2) In contrary to NEC's implication of the existence of a written agreement to final and legal binding arbitration between Plaintiff and NEC, there is no such "written provision" in the Employment Invention and Confidential Information Agreement signed by Plaintiff on 8/31/89 (Exhibit A). Therefore, arbitration award is not enforceable under the Federal Arbitration Act (9 U.S.C. section 1 & 2, et seq.) where "a written agreement to arbitrate in any contract involving interstate commerce . . . " is required as shown in the modified 1987 version of agreement entitled Employment, Invention, Authorship, Proprietary Confidential Information, and Arbitration Agreement, not signed by Plaintiff (Exhibit B).

3) The NEC Employee Handbook has never been designated as a "Contract of Employment". Even NEC admitted that it contains only company policies and procedures. Paragraph 11 of the signed Employment Invention and Confidential Information Agreement unambiguously prohibits NEC to incorporate the language of NEC Company Handbook into the "Contract of Employment". In the motion to make the arbitration award final and legally binding, NEC's attempt to incorporate the company handbook language to the "Contract of Employment" is inconsistent with its own written agreement with Plaintiff.

   Paragraph 11 of the signed "Contract of Employment" states:

   "11. Except as to any employment agreement designated as a "contract of employment", this agreement supercedes all previous understandings, if any, between the Company and me on the subjects contained herein. No terms or provisions of this Agreement shall be varied or modified by

> any prior or subsequent act of either me or the Company except that the Company and I may subsequently amend this agreement by written instruments that specifically refer to this agreement and that are executed in the same manner as this agreement."
> (Exhibit A)

Plaintiff and NEC did not sign any subsequent written agreement to amend or modify the signed written "Contract of Employment" dated 8/31/89.

4) Plaintiff did not make attempt to vacate or modify the arbitration ruling in court because Plaintiff did not agree to final and binding arbitration. Plaintiff had neither signed any written agreement nor verbally commit to final and binding arbitration (Exhibit A and B). Plaintiff only signed the receipts on 9/5/89 and 5/7/90 to acknowledge receipt of the NECEL handbooks which were distributed to every employee at NEC. Plaintiff went through arbitration because NEC did not provide any other means but the company problem resolution process which "is the only process by which an employee or terminated employee may pursue a complaint." (Exhibit S2: NEC Employment Handbook p. 5.2, paragraph 1).

5) Plaintiff, in good faith, attempted to exhaust all administrative procedures to resolve the wrongful termination, mistreatment and employment discrimination imposed by NEC. Plaintiff did not expect that NEC would provide incorrect information and false testimonies to the Unemployment Insurance Appeal Board and the Arbitrator to deprive his unemployment benefits and compensations. Plaintiff did not expect NEC's management to perjure themself under oath while they continued to slander

Plaintiff and destroy his career and personal welfare (Exhibit M, S4, S5, Plaintiff's Closing Brief at private arbiration p.4 to p.26 and Plaintiff's First Amended Complaint).

6) Plaintiff announced his position to NEC regarding to arbitration ruling in his memo dated 11/27/91, addressed to D. Weinberg cc. J. Kagel, D. Mitchell and R. Kahn (Exhibit L), that the judgment of the arbitrator was not final and legally binding on him although it was binding on NEC who published its position in the company policies.

7) Five months before arbitration ruling, Plaintiff had filed a lawsuit against NEC in the Superior Court of the State of California on 6/10/91 pending arbitration proceeding. The week before that, on or about 6/3/91, Plaintiff had filed an employment discrimination complaint to the Department of Fair Employment and Housing (Exhibit I).

8) In his complaint, Plaintiff often refers to his Closing Brief at private arbitration written by his counsel, Robert Kahn, since it contains the background and pertinent facts of the case derived from substantial evidence with the support of witnesses' testimonies and exhibits. Before preparing the comprehensive closing brief, Mr. Robert Kahn had carefully reviewed all the hearing transcripts, exhibits and correspondences of the case, and discussed every aspects [sic] of the case with Plaintiff.

9) NEC attempted to conceal evidence by failing to attach the complete set of PLaintiff's complaint filed in the Superior Court of the State of California which contains Plaintiff's First Amended Complaint, Plaintiff's CLosing Brief at private arbitration, Index of Exhibits, list of Chronological Events and Plaintiff's Complaint submitted to Department of Fair

Employment and Housing, when NEC removed the case to the Federal U.S. District Court.

10) It has come to Plaintiff's surprise that the recording of his testimony on 4/3/91 at private arbitration hearing was apparently altered to make it so unintelligible that the facts are either distorted or misunderstood (Exhibit N and M). The English grammar structure of Plaintiff's recorded testimony was made so broken with strange expressions unfamiliar to Plaintiff that it sounds like Plaintiff has [sic] linguistic communication problem. Plaintiff had to edit the transcript to correct the misrecordings and clarify the facts.

11) NEC's closing brief at private arbitration contains several incorrect facts and misleading statements. Despite the facts that many parts of the testimonies of NEC's witnesses had been proven to be incorrect in the light of substantial evidence, NEC continued to take advantage of its superior economic position as a giant conglomerate Japanese company with vast financial resource to bury Plaintiff with legal paperwork based on unwarranted allegations and frivolous delay tatics.

I understand that we have to submit our Opposition to Summary Judgement by 4/17/92, 10 days before the scheduled hearing on 4/27/92 in the US District Court, in response to NEC's motion to enter the arbitration award and dismiss our complaint. Please let me know when you will have the petition package with points and authorities ready for me to review.

In the meantime, if you need additional information from me to prepare the arguments, please feel free to contact me at any time at the telephone numbers listed above. I also enclose a copy of the transcripts of the hearings on

employment discrimination in Japanese-owned companies in the U.S. held by the U.S. House of Representatives, Employment and Housing Subcommittee of the Committee on Government Operations, presided by Congressman Tom Lantos, as another supporting document to be used in court.

Respectfully Yours,
/s/ Peter Nghiem
Peter Nghiem